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WISCONSIN REPORTS

127

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

JANUARY 30—APRIL 17, 1906

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OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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CASES DETERMINED

AT THE

January Term, 1906.

HAY, Respondent, vs. CITY OF BARABOO, Appellant.

November 16, 1905—January 30, 1906.

(1-12) *Municipal corporations: Injuries from defective sidewalks: Primary liability of lotowners: Statutes: Construction: Repeal by implication: Notice of injury: Presentation of claim: Statute of limitations: Adoption of general charter provisions: Amendment.* (13-17) *Appeal: Reversal of judgment: New trial, when ordered: Direction of judgment: Judgment notwithstanding verdict.*

1. A city charter provision making it the duty of the owners or occupants of premises in front of which sidewalks are located to keep such walks in repair or pay the expenses incurred by the municipality in doing so, does not impliedly make such owners or occupants liable to travelers for injuries occasioned by the walks being out of repair.
2. If, in addition to the duty mentioned in the foregoing paragraph, the charter provides that in case of an injury to person or property by reason of any defect in a sidewalk for which the city would be liable, arising from or produced by the wrong, default, or negligence of any person other than the city, the guilty person shall be primarily liable therefor, and the city shall not be liable therefor in advance of the exhaustion by the injured person of all legal remedies to enforce the private liability, such liability is not deemed to be one of the character of that created by sec. 1339, Stats. 1898, but to be one grounded on common-law principles and so existing independently of statute.
3. Charter provisions of the sort mentioned in paragraphs 1 and 2 aforesaid do not give rise to any liability either public or private to one injured by reason of a defective sidewalk. Re-

sponsibility for the results to person or property from faulty construction of sidewalks or want of repair thereof rests wholly on sec. 1339, Stats. 1898, while responsibility for the results to person or property of active wrongdoing creating a nuisance rests on the common law. Such provisions as those mentioned in paragraph 2 deal with the latter.

4. A provision such as that mentioned in paragraph 2, given effect broadly, would materially modify sec. 1339, Stats. 1898. It should be strictly construed, first, because it would operate to vary the common law as to personal liability; second, it would to some extent repeal sec. 1339, Stats. 1898.

5. Repeals and modifications of existing laws by implication are never favored. In case of a seeming conflict between two legislative enactments, all rules for judicial construction are to be applied to the end that they may be reconciled before reaching a conclusion that the one repeals or modifies the other.

6. Nothing short of language unmistakably creating a liability of the owner or occupant of premises, in front of which a sidewalk is located, for damages to person or property caused by the insufficiency of such walk, and making such liability supersede to any extent that of the city under sec. 1339, Stats. 1898, can legitimately be given that effect.

7. The last foregoing rule is satisfied by provisions in the charter of the city of Fond du Lac, treated in *Hiner v. Fond du Lac*, 71 Wis. 74, and similar cases, but not by provisions in the charter of the city of Janesville, treated in *Selleck v. Tallman*, 93 Wis. 246, and similar cases.

8. The notice required by sec. 1339, Stats. 1898, to be given the municipality in case of injury to a person by reason of want of repair of a sidewalk is a requisite to the creation of a right to compensation for injury.

9. A charter provision prohibiting the enforcement of such a right as that mentioned in paragraph 8, except by presentation of the claim to the city council, and in case of adverse action an appeal to the circuit court, regulates the remedy, and is permissible under the rule that the legislature may take away the ordinary remedy for the enforcement of a right so long as it affords another which is adequate.

10. A charter provision, in addition to the one regulating the remedy, that no action shall be maintained against the city to enforce any tortious liability, unless a notice in writing signed by the person injured, or claiming to be injured, of the wrong and circumstances thereof and amount of damages claimed, shall be presented to the council within ninety days after the

occurrence creating the damage, bears on the remedy and is a statute of limitations.

11. Provisions such as are mentioned in the eighth, ninth, and tenth paragraphs constitute a complete system as to statutory liability. One is essential to the right. The other relates to the procedure for the enforcement of the right. The third fixes the time within which the remedy is available, and at the expiration thereof, in legal effect, extinguishes the right.

12. Adoption by a city existing under a special charter of a part of the general charter, *pro tanto* amends the former and renders it to that extent subject to further amendment by legislative action alone to change the part so adopted.

13. Upon the reversal of a judgment by this court the case is required to be remanded for a new trial only when necessary, and that condition is always deemed to exist, as to a jury case, when, under any circumstances, a new trial might result otherwise than in such a judgment being awarded as would have been rendered before had that fatal error, or errors, not been committed.

14. The practice rule that it is not permissible for a defendant to have judgment in the trial court notwithstanding the verdict, and, to the extent indicated, the one that a judgment in a jury case after trial can only be legitimately granted on a verdict which will support it, are obsolete.

15. A verdict having been rendered, which upon its face is contrary to the undisputed evidence, it may be changed upon motion to correspond with the established state of the case and a judgment be rendered thereon, or judgment may be rendered upon motion of the party against whom the erroneous verdict stands notwithstanding the same. In the event of the proper motion being made in either case in the circuit court and denied and of judgment being rendered according to the erroneous verdict, and the same being reversed upon appeal to this court, the cause may be remanded with directions to grant the motion and render judgment accordingly.

16. The last foregoing rule is based on the theory that a motion having been made in the court below enabling such court to pass upon the identical question decided here and requiring a reversal, the proper solution of which question in the first instance must necessarily have terminated the litigation, the prevailing party on appeal is entitled to have the error fully corrected, which can only be done by requiring the lower court to pass upon such question as it should have done originally, and to close the case accordingly.

17. The rule stated is extended beyond situations to which it has previously been applied, so that in case of a motion for the direction of a verdict at the close of the evidence being denied and a verdict being rendered for the adverse party, and its being held upon appeal that the motion should have been granted, and for reasons necessarily precluding the losing party from securing any different result by another trial than the one that would have necessarily followed a correct decision of the motion in the first instance, this court may cause the litigation to be terminated in the court below without a new trial, to that end remanding the cause with directions to grant the motion previously denied, and to render judgment accordingly. [Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to recover compensation for personal injuries alleged to have been sustained by reason of an insufficient sidewalk in the defendant city.

Omitting formal matters, the circumstances relied upon for a cause of action, as alleged, were these: October 22, 1902, about 7 o'clock p. m., plaintiff while traveling along the sidewalk on the westerly side of Grove street in the defendant city, in the exercise of ordinary care, at a point specifically mentioned, fell and was greatly injured by reason of the insufficiency and want of repair of such walk. The insufficiency of the walk consisted of a hole therein produced by the removal of one of the decking boards about eight inches wide and four feet long. Without fault on her part, plaintiff stepped into such hole and was thereby thrown down and her right leg between the knee and ankle injured, her body and her right arm bruised, and she was otherwise severely injured, to her damage in the sum of $5,000. The defendant, through its officers having charge of such matters, knew of such defective condition for several months prior to the injury. October 31, 1902, plaintiff caused written notice of the injury to be personally served on the mayor and clerk of the city, stating the time and place of the injury, the

insufficiency and want of repair causing the same, and that she claimed satisfaction for her injury. January 28, 1903, plaintiff caused a written notice of her claim to be served personally on the mayor and clerk of the defendant, and to be filed with the city clerk, stating the time and place of the injury and describing the insufficiency which caused it, and the amount of damages sustained. March 26, 1903, her claim was duly rejected by the city, and two days thereafter notice of such rejection was served upon plaintiff. April 14th thereafter plaintiff duly appealed to the circuit court from such disallowance, giving notice and filing a bond as required by law in such cases. The damages claimed were for $5,000.

The defendant answered putting in issue the allegations to the effect that sec. 1339, Stats. 1898, respecting the service of written notice of the injury was complied with, and alleging as follows: No statement in writing was presented to the common council in accordance with sec. 26, subch. XII, ch. 21, Laws of 1882; secs. 6–8, subch. V, ch. 21, Laws of 1882, regulating the subject of disallowance of such claims by the defendant and appeals therefrom were not complied with, particularly in that the bond therein required was not given; the time for presenting the alleged claim under sec. 26 aforesaid expired January 20, 1903. Plaintiff having failed to comply with the requirements of defendant's charter referred to, no claim on the part of the plaintiff was ever perfected against the city for the alleged injury. Secs. 28, 29, subch. XII, of the aforesaid law imposed upon the owner or occupant of property abutting on a street the duty of keeping the sidewalk in repair. The premises in front of which the injury is alleged to have occurred were occupied by a tenant of the owner. It was his duty to keep the sidewalk in a safe condition. The remedies against him and his landlord have not been exhausted. The alleged injuries were caused by plaintiff's want of ordinary care. She knew of the con-

dition of the walk, but proceeded thereon regardless of the existence of the defects therein.

At the commencement of the trial there was a demurrer to the complaint *ore tenus,* based on the theory that whereas the city adopted secs. 925—58 to 925—60, Stats. 1898, a part of the general city charter law, the effect thereof was to substitute the adopted portion of the general charter in place of sec. 8, subch. V, of the city charter, leaving sec. 26 of subch. XII of the city charter still in force, and that such provision governed the subject of enforcing such a claim against the city; that the charter was amended by the adoption of the general charter provision, as aforesaid, in March, 1898, before the Statutes of 1898 went into effect.

At the close of plaintiff's case there was a motion made for the direction of a verdict, which was denied. At the close of all the evidence there was a motion made for a verdict in favor of the defendant, which was denied. The cause was submitted to the jury upon the evidence under instructions, resulting in a verdict in plaintiff's favor for $500. Proper motions were made and exceptions taken to preserve for review questions treated in the opinion. Judgment was rendered in plaintiff's favor upon the verdict, and defendant appealed.

John M. Kelley, attorney, and *F. R. Bentley,* of counsel, for the appellant.

Daniel H. Grady, for the respondent.

The following opinion was filed December 12, 1905:

MARSHALL, J. Appellant's charter at sec. 29, subch. XII, ch. 21, Laws of 1882, provides that "the duty of always keeping the sidewalks . . . on or adjacent to the lots and premises of any person, in safe condition and good repair, is hereby expressly enjoined and imposed upon all owners or occupants of said lots and premises," and the preceding section provides that "in case of injury or damage by reason of

insufficient, defective or dangerous condition of [a] . . . sidewalk . . . *produced or caused by the wrong, neglect of duty, default or negligence of any person or corporation,* such person or corporation shall be primarily liable for all damages for such injury, in suit for the recovery thereof by the person sustaining such damages, and the city shall not be liable therefor until all legal remedies shall have been exhausted to collect such damages from such person or corporation."

The evidence tended to show that the injury complained of was caused by the defective condition of a sidewalk in front of occupied premises, and that no effort was made by respondent prior to the commencement of this action, or at any time, to recover her damages of such occupant or the owner of such premises. The complaint, as indicated by the statement, was barren of all allegations in respect to liability of such owner or occupant.

Counsel for appellant insist that under the circumstances stated the trial court should have sustained the demurrer to evidence, and failing in that should have granted the motion for a verdict at the close of respondent's evidence in chief, and failing in that should have granted the motion for a verdict at the close of all the evidence. That is grounded on *Amos v. Fond du Lac,* 46 Wis. 695, 1 N. W. 346; *Hiner v. Fond du Lac,* 71 Wis. 74, 36 N. W. 632; *Henker v. Fond du Lac,* 71 Wis. 616, 31 N. W. 187; *Devine v. Fond du Lac,* 113 Wis. 61, 88 N. W. 913; *Gordon v. Sullivan,* 116 Wis. 543, 93 N. W. 457. On the other hand counsel for respondent argue that the provisions of the charter referred to are entirely unlike those in the charter of the city of Fond du Lac; that they are in all essential particulars like those in the charter of the city of Green Bay and in that of the city of Janesville, which have been held to permit of enforcing the city liability in a case like this without reference to any liability of the owner or occupant of the premises in front of which the injury occurred. *Toutloff v. Green Bay,* 91 Wis.

490, 65 N. W. 168; *Selleck v. Tallman,* 93 Wis. 246, 67 N. W. 36.

In the Green Bay charter the only provisions bearing on the subject here were: First, one giving the city full authority to control and repair the sidewalks. Subd. 40, sec. 3, subch. IV, ch. 169, Laws of 1882. Second, one whereby the expense of keeping sidewalks in repair was made chargeable to abutting lots, and the duty of keeping the sidewalks in a safe condition and good repair was enjoined upon the owners or occupants of lots. Sec. 5, subch. VI. Third, one making it the duty of the street superintendent to inspect the walks from time to time as needed, and properly repair all defects not requiring an outlay exceeding $5 in any one instance, and in other circumstances to make the repairs in case of the owner of the lot neglecting to make them within twenty-four hours after being notified so to do, the expense in any case being chargeable against the lot. Sec. 7, subch. VI. The court reached the conclusion that the liability of the lotowner was to the city only, and merely to repair the walk when ordered to do so or to pay the expenses thereof. There was no expression in the charter anywhere, in terms or in effect, that he should be liable primarily or otherwise directly to a traveler injured by a want of repair of the walk.

In the Janesville charter considered in *Selleck v. Tallman, supra,* there were provisions, in effect, as it was said, the same as in the Green Bay charter. The city was given absolute control over the streets with power to improve the same for public use, but as to the making of sidewalks only at the expense of the owners of abutting lots. Sec. 1, subch. VII, ch. 221, Laws of 1882, and subd. 4, sec. 23. The duty, in case of the construction of a sidewalk, of making it reasonably safe and suitable for public travel and keeping it in such condition, was imposed on the city by sec. 1339, Stats. 1898, unaffected by any charter provision, since there was nothing therein creating such duty nor any inconsistent with the gen-

eral law. *Kittredge v. Milwaukee,* 26 Wis. 46; *Harper v. Milwaukee,* 30 Wis. 365; *Ripon v. Bittel,* 30 Wis. 614, 617; *Hincks v. Milwaukee,* 46 Wis. 559, 567, 1 N. W. 230; *Huston v. Fort Atkinson,* 56 Wis. 350, 14 N. W. 444. Those cases show clearly that it has not, since the inception of our system of statutory liability of municipalities for reasonably safe condition for public use of streets and sidewalks, been supposed to be necessary to search a city charter in any case to discover whether such liability was imposed thereby or not. Charter provisions in respect to the matter have been examined only to discover whether the general law on the subject in any particular was modified or repealed.

On the subject of liability of lotowners for damages as regards sidewalks, sec. 19, subch. XII, ch. 221, aforesaid provided, if not repealed, as follows:

"Whenever any injury shall happen to persons or property in said city, by reason of any defect in any street, sidewalk, alley or public ground, or from any other cause for which the said city would be liable, and such defect or other cause of such injury shall arise from or be produced by the wrong, default or negligence of any person or corporation other than said city, such person or corporation, so guilty of such wrong, default or negligence, shall be primarily liable for all damages for such injury, and the said city shall not be liable therefor until after all legal remedies shall have been exhausted to collect such damages from such person or corporation."

By sec. 3, ch. 102, Laws of 1889, amending subd. 4, sec. 23, aforesaid, there was imposed on lotowners the duty of repairing sidewalks in front of their premises more specifically than before, this language being used: "It shall be the duty of the owner or owners of each lot or parcel of land abutting upon any street within the city to . . . keep in repair, at his or their own expense, a standard sidewalk in front of said lot or parcel of land, and if no standard sidewalk shall have been fixed for said street, or that part thereof,

where the land of such owner or owners is situated, then such a good and sufficient sidewalk as shall be approved by the street commissioner. Whenever the owner or owners of any lot or parcel of land abutting upon any street shall fail or neglect to . . . keep such sidewalk in good and proper repair," the same may be done by the city at his expense, the manner of doing the same and enforcing the liability for such expense being particularly pointed out. Taking all of the provisions of the charter together, it was said in *Selleck v. Tallman, supra,* that they left the city absolutely liable under the general statute for reasonable safety of its sidewalks, and made lotowners absolutely liable to the city to execute its duty to repair such walks, or reimburse it for the expenses thereof. As reasoned in *Toutloff v. Green Bay,* it was held that the policy of the legislature had been so long and firmly entrenched in our system to make municipalities liable primarily and directly to sufferers from the failure to keep the public ways in a reasonably safe condition for public travel that nothing short of some unmistakable repeal of the statute on the subject could reasonably be deemed to have been intended for that effect.

Taking the amended provisions of the law of 1889 with sec. 19, subch. XII, of the Janesville charter, which we have quoted, by themselves, they seemed to exempt the city from any primary liability for injuries caused by defective sidewalks, but when to reach that conclusion it was necessary to hold that sec. 1339, Stats. 1898, was repealed, as regards giving injured persons any direct remedy against the city, the rule came into operation that statutes should not be deemed to have been repealed by implication, if by any reasonable construction that result is avoidable. *Mason v. Ashland,* 98 Wis. 540, 545, 74 N. W. 357.

The fact that sec. 19, subch. XII, of the Janesville charter aforesaid existed before there was any provision thereof imposing a duty on lotowners to repair sidewalks, and that it

was not associated in the amended charter with the provisions in relation to the repair of streets and sidewalks, the latter being in subch. VII relating to streets and highways, and the former in subch. XII relating to miscellaneous provisions, rather repelled the idea that the general law on the subject of statutory municipal liability was intended to be to any extent superseded. Such idea was further repelled by the settled policy of protecting travelers from the consequences of defective public ways by the responsibility of the public corporation controlling the same, and that to give in addition the liability of abutting lotowners and compel that to be exhausted before resorting to municipal liability, instead of giving additional protection to the traveling public, impaired the protection theretofore existing. *Toutloff v. Green Bay, supra.* Such idea was further repelled by the fact that, while the duty of lotowners to repair sidewalks was of no substantial benefit to the public over that secured to them under the general statutes, it was of great benefit to the municipality, in that all the expense of making the repairs was entirely shifted from it to the lotowner. Looking at the words of sec. 19, subch. XII—which are precisely the same as sec. 28, subch. XII, of appellant's charter, making the liability as between the injured person and the owner of the lot abutting on the street where the injury occurred primary, "whenever any injury shall happen . . . by reason of any defect . . . for which the city would be liable, and such defect or other cause of such injury shall arise from or be produced by the wrong, default or negligence of any person or corporation other than said city, such person or corporation . . . shall be primarily liable,"—it seemed reasonable in deciding the *Selleck Case* to conclude that they referred not to statutory liability, but to liability for the results of active wrongdoing, such as would render the municipality liable independently of the statute,—those liabilities which rest upon a city the same as on an individual upon

common-law principles: such as are referred to in *Hincks v. Milwaukee,* 46 Wis. 559, 1 N. W. 230; *Hughes v. Fond du Lac,* 73 Wis. 380, 41 N. W. 407, and similar cases. In that the court followed numerous decisions where the same or similar language was construed.

In the first case cited the language under consideration was this:

"Whenever any injury shall happen to persons or property in the said city of Milwaukee, by reason of any defect or incumbrance on any . . . sidewalk . . . or from any other cause for which the said city would be liable, and such defect, . . . or other cause of such injury shall arise from or be produced by the wrong, default or negligence of any person or corporation, such person or corporation so guilty of such wrong, default or negligence shall be primarily liable for all damages for such injury; and the city shall not be liable therefor until after all legal remedies shall have been exhausted to collect such damages from such person or corporation."

That language in the Milwaukee charter is probably the parent of the similar provision in appellant's and in many other charters in this state. It was incorporated into the charter of the city of Sheboygan, and thus construed in *Raymond v. Sheboygan,* 70 Wis. 318, 35 N. W. 540:

"The very obvious intent and meaning of this provision is to require the injured party first to exhaust all legal remedies to collect his damages from the wrongdoer or person causing the defect . . . before the liability of the city shall be enforced. . . . It was intended to relieve 'the city, as far as possible with justice to the injured party, from liability for injuries occasioned by obstructions unlawfully placed in its streets by persons for whose acts it was not directly responsible, and that whenever the person injured can, by use of the remedies furnished him by the law, recover his damages of the party primarily in fault, therefore primarily liable,' he must do so before resorting to his remedy against the city."

Much confusion exists in failing to differentiate between those circumstances where the liability of the city was wholly

statutory and the only one to be resorted to, and the circumstances where the city was liable by statute and upon common-law principles as well, or upon the latter only, and there was also liability upon common-law principles of a private person, giving the injured party, in the absence of any statutory regulation, an absolute choice of remedies or the right to enforce both liabilities in one action. As to the latter such charter provisions as those we have under consideration do not create a right or give a remedy for its enforcement. They merely regulate the same, providing that the one primarily to blame shall be primarily called to account.

The method of approach adopted when this question was first presented here for adjudication was to claim that since the city charter imposed upon lotowners the duty to repair, the principle should apply that where the law imposes a specific duty upon one person for the benefit of another an action will lie in favor of that other against that one, in case of there being damage by failure of such person in the performance of such duty. But the premises upon which the rule was invoked were found wanting, in that the duty to repair was not imposed on the lotowner for the benefit of travelers, but in the aid of the execution by the city of its duty created by general law or its charter, or both.

Turning to the cases upon which counsel for appellant rely, we can readily see why the construction adopted as to charter provisions, such as those in question, could not apply to the charter of the city of Fond du Lac. In the latter the legislature in unmistakable language not only imposed upon lotowners the duty to repair sidewalks in front of their premises for the benefit of travelers, but *ex industria* construed its enactment. Reading the language of secs. 1, 2, subch. XVIII, ch. 152, Laws of 1883,—the Fond du Lac charter,—together we have this, in case of injury or damage happening to any one by reason of insufficiency of a sidewalk:

"Every owner of any lot, part of lot, or parcel of land, in said city . . . in front of, or adjoining, which there shall

have been or shall hereafter be placed . . . any walk, or sidewalk, . . . shall at all times keep and maintain said walk or sidewalk, . . . in a safe, convenient and effective condition, for the use of any person or persons desirous to walk thereon; and any person who may have been or shall hereafter be injured by reason of the unsafe or defective condition of such walk, or sidewalk, shall have the right to maintain an action . . . against such owner . . . for all damages or injury of every nature, resulting to such person . . . by reason of the neglect of such owner. . . . It is hereby declared to be the true meaning and intent of this act, . . . that the said city of Fond du Lac, shall not, in any case, be liable to any person or persons, for damages resulting from the defective, unsafe or dangerous condition of any walk or sidewalk, . . . and the only cause of action to which the said city of Fond du Lac shall be liable, or which shall be maintained in any court against said city, in connection with, or relation to damages resulting from failure to keep the walks or sidewalks in said city, in a safe, . . . condition, shall be by reason of the failure of any person or persons to collect a judgment recovered against such owner, or owners, . . . for any such damages, resulting from such injuries, as hereinbefore stated."

Thus it will be seen that the legislature unmistakably created a private liability where one did not previously exist, and made it the sole resort of the injured party, until such time as it should be established that, without liability of the city also, he would be remediless. The charter gave him an absolutely new right and provided for its enforcement, special care being taken to indicate that the purpose of the enactment was to displace the general law on the subject of municipal liability, so far as inconsistent therewith.

The foregoing analysis would seem to demonstrate that there is no similarity whatever between appellant's charter and the charter of the city of Fond du Lac; and that the former is in all essential particulars similar to the charter of the city of Janesville, as it existed at the time of the decision in *Selleck v. Tallman, supra.* It follows that, subject to the provisions of law requisite to perfect, and the provisions for the

enforcement of it, the liability in this case was primarily and exclusively against the city.

It is a verity in the case that appellant adopted parts of the general charter law, as stated in the answer, prior to the happening of the injury. Before such adoption the charter system for the enforcement of all liabilities of the city of a contractual nature, with some slight exceptions was embodied in secs. 5–8, subch. V, ch. 21, Laws of 1882. They provided: First, for the allowance by the common council of such a claim only upon its presentation to such council properly itemized and verified by the owner or some person in his behalf. Second, in case of disallowance of the claim, for further prosecution of the matter only by appeal to the circuit court from such disallowance. Third, for the entry of the appeal, upon the papers being duly transmitted to the clerk of the circuit court, and trial of the matter as in case of an action appealed from justice court. Fourth, that action on any claim against the city, with certain exceptions not referring to such liabilities as the one involved here, other than as indicated, was prohibited; and the determination of the council was made conclusive and a perpetual bar to any proceedings to recover thereon, in the absence of an appeal being taken within the time and in the manner pointed out, save only a remedy by action commenced in the ordinary way was preserved in case of a refusal by the council to act in the matter upon the claim being properly presented therefor. The ordinary method of enforcing liabilities of a tortious character was left unaffected by the charter, but the right to the ordinary remedy was limited by sec. 26, subch. XII, of the charter in these words:

"No action in tort shall lie or be maintained against the city of *Baraboo,* unless a statement in writing, signed by the person injured or claiming to be injured, of the wrong and circumstances thereof, and amount of damages claimed, shall be presented to the common council within ninety days after the occurring or happening of the tort alleged."

The allegations of the complaint as to nonperformance of the condition mentioned were established by the evidence. Counsel for appellant insisted upon the trial, and still insists, that such nonperformance extinguished whatever right respondent had against the city, the same as the operation of any full limitation period set by law for the enforcement of any right by a judicial remedy extinguishes such right. Respondent's counsel contends that said sec. 26 was repealed by the adoption of the general charter system for the enforcement of municipal liabilities. If the former are right, a verdict of no cause of action should have been directed in appellant's favor.

It is not claimed that there was any repeal of the limitation clause of the special charter other than by implication. The adoption proceedings expressly made those parts of the general charter law relating to the enforcement of municipal liabilities as they existed in March, 1898, a part of the special charter, in lieu of the system therein for the enforcement of all claims of a contractual nature. Secs. 6–8, subch. V, before referred to. The general charter system was then embodied in sec. 58, ch. 326, Laws of 1889, as amended by sec. 27, ch. 312, Laws of 1893, and secs. 59 and 60 of said ch. 326. In its entirety it provided as the only means for enforcing any claim or demand of any kind or character against a city, presentation thereof to the common council for allowance, and in case of adverse action, or failure to pass upon the matter at all within sixty days after such presentation, an appeal to the circuit court within the time and in the manner specified. Express or constructive disallowance of the claim, and failure to invoke efficiently such appeal remedy, rendered such disallowance final and conclusive and a bar to any action in any court in respect thereto.

It is suggested that those parts of the general charter law, adopted as stated, were changed by the revision of 1898, and that sec. 58 of the general charter was subsequently changed

by ch. 127, Laws of 1899. We do not deem it necessary to discuss that matter. The parts adopted were at the time of adoption to the effect we have indicated. Notwithstanding any changes which subsequently occurred they were the same in every essential particular at the time of the occurrence complained of as when adopted. They are included in secs. 925—58 to 925—60, Stats. 1898, as amended by ch. 127, Laws of 1899. That the change in the special charter entirely superseded that part thereof contained in said secs. 6–8, subch. V, as to the enforcement of claims of a contractual character, and also the ordinary remedy for the enforcement of actions of a tortious character, there can be no reasonable doubt. *Sheel v. Appleton*, 49 Wis. 125, 5 N. W. 27; *Mason v. Ashland, supra; Watson v. Appleton*, 62 Wis. 267, 22 N. W. 475; *Koch v. Ashland*, 83 Wis. 361, 53 N. W. 674; *Telford v. Ashland*, 100 Wis. 238, 75 N. W. 1006; *Gutta Percha & R. Mfg. Co. v. Ashland*, 100 Wis. 232, 75 N. W. 1007; *Seegar v. Ashland*, 101 Wis. 515, 77 N. W. 880; *Morgan v. Rhinelander*, 105 Wis. 138, 81 N. W. 132. The language of sec. 58 of the general charter, as it stood at the time of the happening of the injury, was substantially the same as that considered in the cited cases, and required every claim or demand of every character whatsoever to be enforced, if at all, by presentation thereof to the common council for allowance. The effect of the adoption of such section as an amendment to the special charter was to make all subsequent changes in such section modifications of the special charter accordingly. The necessary effect of adopting a part of the general charter by a city existing under a special charter is to place such city *pro tanto* under the general law as the same may be from time to time changed. That precise point has not heretofore been decided, but the same seems to be too clear for reasonable controversy.

We are unable to discover in the argument of counsel for respondent, or otherwise, any efficient answer to the conten-

tion of counsel for appellant that the limitation clause of appellant's charter, as to the prosecution of actions of this sort, as it existed prior to the adoption of the general charter provisions, was not changed thereby.

As before suggested, there was no express repeal, except of secs. 6–8, subch. V, before referred to. Implied repeals are never favored. Every rule of construction is to be applied without efficiently harmonizing provisions seemingly in conflict, before holding that there is any irreconcilable inconsistency between them. *Mason v. Ashland, supra.* It does not seem that we need to go that far in this case because there is no apparent conflict to be dealt with, as we read the charter provisions. Sec. 26, subch. XII, of appellant's charter relates wholly to a subject entirely foreign to secs. 58–60 of the general charter law, as they existed at the time of the injury in question. The former is a limitation upon the use of judicial remedies for the enforcement of a right,—a statute of limitations pure and simple. The latter is a substitute for the ordinary method of invoking judicial remedies for the enforcement of rights. The ordinary remedy is taken away and a new one is given in place thereof, which is permissible. It is no more inconsistent with the limitation feature than with sec. 1339, Stats. 1898, as regards the existence of a right of the sort here involved. The three together make this complete system. The right to hold the city liable upon its statutory obligation to keep its sidewalks reasonably safe for public travel, in case of an injury to person or property by a breach of such obligation, is conditioned upon compliance with said sec. 1339, as regards within fifteen days after the happening of the event causing the injury, giving notice in writing signed by the party, his agent or attorney, to the mayor or city clerk, stating the place where the damages occurred and describing generally the insufficiency, or want of repair, which occasioned it, and that satisfaction therefor is claimed of the city. The remedy for vindicating the right, when it shall

have been established in the manner aforesaid, is governed by the general charter provisions adopted as before indicated. The condition of the right to use such remedy is in sec. 26, subch. XII, of the charter prohibiting the same, "unless a statement in writing, signed by the person injured or claiming to be injured, of the wrong and circumstances thereof, and amount of damages claimed, shall be presented to the common council within ninety days after the occurring or happening of the tort alleged." As respondent failed to comply with that condition her right to damages, though perfected by complying with sec. 1339, Stats. 1898, ceased to exist before she commenced her action, so to speak, in the only way open to her in any event, by presenting her claim to the common council for allowance under sec. 58 of the general law. There is no manner of escape from this. One law is a condition of the existence of a right, another gives a new remedy for the enforcement of the right in place of the old one, and another operates upon the remedy and may extinguish it. That said sec. 26 was intended as a limitation upon the right to a remedy is very clear. That it must be given the same force as is accorded to other limitation acts, so far as it goes, is just as clear. Any law creating a condition of the enforcement of a right to be performed within a fixed time is a statute of limitations with all that the term signifies. That is elementary. It has been applied in many cases, notably in *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301, 306, 78 N. W. 412.

It follows that the motion for a direction of a verdict in defendant's favor at the close of the evidence should have been granted. Further proceedings, under the circumstances, in the court below, other than such as may be necessary for the dismissal of the action, with costs in favor of the defendant, would be useless. As stated in *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800, in the language of Mr. Justice WINSLOW, "the substance of the requirement" as to proceedings in the trial court for judgment for one party, when taking the

verdict at its face the judgment should and does go the other way, to entitle such party upon prevailing on appeal to a direction from this to the lower court to render judgment in his favor "is that the appellant shall move for judgment after the verdict is in, so that the trial court may have an opportunity to pass on the question." The real philosophy of that, it seems, is that when one obtains judgment in the trial court, though upon the pleadings and the evidence the right of the matter is conclusively with his adversary, such court must be so challenged in respect thereto by the latter to at least afford it ample opportunity to considerately pass upon the matter in order to enable the one aggrieved to obtain a direction for judgment upon his successfully appealing to this court. No reason is perceived why that is not as fully satisfied when a motion is made in the trial court for a verdict upon the pleadings and evidence, as where one is made thereon for a judgment regardless of the verdict. In practical effect, the point the court is called upon to decide in one case is the same as in the other. The opportunity to decide the matter considerately is the same whether the motion is made before or after verdict.

Muench v. Heinemann, supra, responding to the spirit of the Code, and it is believed its letter as well, distinctly repudiated the old practice that only the plaintiff can successfully invoke the trial court for judgment notwithstanding the verdict. It changed the practice theretofore somewhat intrenched here, rendering necessary a motion in such court for such changes in a verdict rendered contrary to facts conclusively established, necessary to make it harmonize with such facts, and on its face support a judgment, in order to warrant this court, upon the party aggrieved by a judgment upon the erroneous verdict prevailing upon appeal, in directing the entry of such a judgment as will end the litigation. It held that a motion after verdict was sufficient to enable the court to pass upon the matter, which satisfied all reasonable requirements, leaving the erroneous verdict, or any verdict, as with-

out necessary significance. It brushed away, so to speak, all mere forms, whether of the ancient or modern practice, because the basic reasons therefor are only to be found, as was said, "in finespun distinctions, more fanciful than convincing," and anchored firmly to the substance of things rather than to mere shadows and useless forms. It would seem that the advanced position so taken logically warrants us in holding, if it does not require us to do so, that upon a recovery here, the prevailing party having in the court below made a motion for the disposition of the cause in his favor by the direction of a verdict, thus affording such court full opportunity to pass upon the very matter presented here, the cause may be remanded for the judgment which would necessarily have resulted from the granting of such motion, when it conclusively appears that in no event could a new trial otherwise result. That would be strictly within the letter of sec. 3071, Stats. 1898, providing that upon a reversal here a cause may be remanded for a new trial "if proper and necessary," and strictly in harmony with the fact that our system is governed by the Code, and the practice not inconsistent therewith, which this court, under its inherent and statutory power, sees fit to establish.

By the Court.—The judgment is reversed, and the cause remanded with directions to enter judgment dismissing the action, with costs in favor of defendant.

A motion for a rehearing was denied January 30, 1906.

MONTANYE, by guardian *ad litem,* Respondent, vs. NORTHERN ELECTRICAL MANUFACTURING COMPANY, Appellant.

November 17, 1905—January 30, 1906.

Master and servant: Actionable negligence: Defective machinery: Abnormal action: Instructions to jury: Court and jury: Special verdict: Cross-examination: Argument of counsel: Prejudicial error.

1. In an action for personal injuries to a servant, evidence of abnormal action of a machine can only be the basis of an inference tending to show an insufficiency in the construction and repair of the machine as the producing cause of the injury, which is conclusively rebutted by evidence showing that the machine was free from all discoverable defects, and hence, on such evidence alone, no grounds exist on which the jury can find that any defect existed in the machine which the master in the exercise of ordinary care ought to have discovered.
2. Where evidence of alleged defects in a machine would not reasonably admit of an inference that such defects caused the abnormal action of the machine, it is error to refuse a requested instruction, in substance, that the evidence bearing on such defects was not sufficient to sustain a finding that the machine was defective, and that no want of ordinary care could be imputed to defendant with respect thereto as the cause of the injury.
3. Where it is made to appear that the abnormal action of a machine, in the operation of which a servant was injured, might result from a specific defect, and the evidence on the subject is conflicting, the court should submit to the jury the question of the master's negligence on that ground.
4. In an action for personal injuries received in operating a machine it is not error to refuse to submit, as part of a special verdict, questions covering different phases of the evidence concerning the nature of the defects, if the machine was found defective in construction or repair, since they required the jury, in answering the general and proper questions respecting the alleged negligence of the defendant, to state the specific grounds for their findings.
5. A master's duty to a servant requires that he exercise reasonable care in furnishing reasonably safe instruments and that he exercise a like degree of care in making repairs.

6. A party should not be deprived of his right to cross-examination by so limiting its scope that the value and weight of the evidence given on the direct examination may not be fully tested.
7. In an action for injuries to a servant received in operating a machine, the court, jury, and both parties, on plaintiff's request and defendant's assent, viewed and inspected the machine in operation at defendant's shop. No request was made by plaintiff for the production in court of the machine or any of its parts, and defendant made no offer of it or any of its parts as an exhibit during the trial. The machine was installed and in use in defendant's factory, its size and weight evidently made it difficult to transport, and detachment of its parts would prevent its use. *Held*, that it was error to rule that it was justifiable for plaintiff's counsel to argue that such nonproduction was evidence tending to refute defendant's claim that the machine was free from all discoverable defects.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The plaintiff entered defendant's employ on May 2, 1904, and while operating a punch press in defendant's shops was injured on June 9th following. The defendant is a corporation engaged in the manufacture of electrical appliances. The machine which plaintiff operated at the time of the accident is known as the Bliss Press No. 20. It was installed in defendant's shops in February, 1902. In so far as the record discloses it was of standard and approved design and construction and such as is in common use by manufacturers. It is operated by an independent electric motor connected with the fly wheel of the press, which revolves upon a shaft that is stationary when the press is not in operation. The main operating parts of the press rest on and are held in place by a heavy frame, and consist of the fly wheel, a crank shaft, a drop punch, a table and die, and the brake. The parts employed in putting the machine in action consist of a treadle, a treadle spring, treadle rods combined with a rocker, a latch to which is joined a latch spring, a trigger, and trigger spring. The trigger is integral with a clutch placed in a groove of the shaft on which the fly wheel revolves. In operating the ma-

chine the communication of power from the motor rotates the fly wheel upon the stationary crank shaft. To put the punch in operation the person manipulating the machine presses down the treadle with his foot. This draws down the lower treadle rod, which is connected with the treadle lever below and the rocker arm above. The rocker arm is thereby depressed, and with it the upper treadle rod attached to the rocker arm at its lower end and to the arm of the latch at its upper end. This movement draws down the latch arm, and throws the latch out of engagement with the trigger. This release of the trigger permits the trigger spring to move the trigger, which turns and throws the clutch out into one of two grooves of the fly wheel, thereby engaging the wheel and the crank shaft, causing it to rotate and the punch attached to the crank of the shaft in turn to drop and rise at each turn of the wheel and shaft. When the machine is running the shaft makes 120 revolutions a minute, thus making the punch drop at the rate of 120 times per minute while it continues in operation. Upon removal of the pressure from the treadle, the power on the treadle and the rocker arm is reversed by means of a treadle spring, which lifts the treadle lever, and pushing the rods up throws the latch into place so that it will engage with the trigger, thereby disengaging the clutch from the fly wheel, causing the shaft to stop with the crank in an elevated position, and holding the punch suspended above the die table of the press. The stopping of the shaft and the holding of the punch are designed to occur automatically in the normal operation of the press. In using the press for making disks and doing similar work the person manipulating the press places the material on the die, presses the treadle with his foot, and then releases it at once. This drops the punch, raises it again, stops it automatically, and holds it there until it is dropped again by throwing these operative parts of the machine into action again by pressure on the treadle. The dies used are of different kinds to meet the

various wants for different products. Two of them are attached at a time, one to the table and another to the punch. The latter drops on to the material placed on the lower and stationary one. The space between the dies, when the punch is lifted to its full height, is about three inches.

The plaintiff had been employed in several manufacturing establishments as an apprentice, and with a view of obtaining practical knowledge of machines and their operation had worked about and with machinery from August, 1902. He had worked with a punch press like the one in question, but of a smaller size. It appears that plaintiff had the intelligence to comprehend his work and to understand in a general way the nature of his employment and the liability to injury from dangers apparently incident to it. He received no special instructions concerning the danger incident to running the press. He testified that defendant's department foreman showed him how to place the material to be run through the press on the lower die, and to trip the press, and to remove the product with the hands, and that he did the work in the way in which the foreman did it in showing him. This testimony is contradicted by the foreman. Plaintiff states that he worked at the press on Monday, punching copper segments; that he continued working there on Tuesday, making mica segments until about 9 o'clock in the forenoon, when the punch dropped repeatedly without pressure on the treadle; that he called the foreman's attention to this abnormal operation, as he had been instructed to do; that the foreman then cut off the power, adjusted some of the parts of the machine, and directed plaintiff to proceed with the work; that he did so, and that at the first operation the punch dropped twice without stopping. This occurred in the presence of the foreman, who again made further adjustments and again directed plaintiff to proceed with his task, telling him that the machine was all right. He worked at the press on Wednesday until a part of the punch broke. The foreman was notified of

this, and he removed parts of it for repair, and set plaintiff at other work for the remainder of the day. On Thursday, June 9th, plaintiff was directed by the foreman to work at the press making disks, and was assured by him that the machine was set up for the job and that it was all right. He continued the work, with the exception of about an hour spent at other work, until 11:15 o'clock, when he tripped the press in the usual way to cut a disk out of a piece of tin placed in the lower die; the punch dropped, but the lock failed to hold and stop it automatically after being elevated on the first revolution, and the punch dropped again a second time before stopping, without any pressure having been applied to the treadle. The second drop of the punch caught his hand, and severed parts of it.

Plaintiff was the only person who observed the operation, and his testimony as to the second dropping of the punch is as follows:

"*Q.* Now, at the time you were injured state whether or not it dropped the second time rapidly or slowly. *A.* Dropped rapidly. I had to put my hand under to get the work out, and that is the position my hand was in when the punch dropped. I hadn't had time to draw my work out."

On cross-examination, in speaking of the abnormal dropping on a prior occasion after the foreman had been notified and had adjusted parts of the machine, he states:

"After he [the foreman] tried it a couple of times it worked all right, and I went to work. *The first time* I put my foot on the treadle it dropped again. It did not continue to drop that time; just dropped twice, that is all. *Q. Just the same as it did the time you hurt your hand later?* *A.* Yes, sir."

He stated that the pieces of tin for making disks, used by the foreman in showing him how to run the press and to do his work, were placed on the die with the hands, and that the disks were removed by hand after the punch had dropped and returned to its stationary position; that he did the work

in this way when he was injured; that the disks and rims of tin left as waste were of such size, shape, and in such position on the die that it was necessary to put his hand under the area of the cutting die of the punch in order to remove them. This is denied by defendant's experts on the subject.

Evidence was also adduced bearing on the following questions: (1) That the treadle latch attached to the frame of the machine, over the treadle, might possibly have become loosened and momentarily have held the treadle down, and after the removal of the foot from the treadle have caused the second drop of the punch. (2) That the trigger spring and clutch were gummed from accumulations of oil and dust so as to retard their action and to prevent them from performing their functions in the normal operation of the press. (3) That the treadle rod, leading from the treadle lever to the rocker arm, was attached to the rocker arm by a set-screw, and that this set-screw was worn loose and was liable to permit the treadle rod to slip and move in the rocker and result in defective operation of the latch by failing to engage the trigger, and thereby bringing about the regular automatic stopping of the punch after it had dropped and risen. (4) As to the absence of a lock nut on the set-screw, to hold it in place after being firmly set to hold the treadle rod. Proof of abnormal operation of the press was given by a number of witnesses besides plaintiff, and was to the effect that in operating the machine at different times before the accident it had made a second drop after the removal of the foot from the treadle, and that defendant's officers and agents had been informed of such defective operation. Defendant adduced evidence showing that the machine was of approved design and construction and the same as those commonly and generally used by manufacturers as standard, and adduced the evidence of its superintendent, department foreman, and others tending to show that the machine was free from discoverable defects which might cause the defective operation complained of.

A number of exceptions were preserved to rulings on evidence, on refusals to submit requested questions in the special verdict, on refusals to give instructions and to instructions as given, and to remarks by plaintiff's counsel to the jury. The particular matters recited in the exceptions will be referred to in the discussion, so far as may be necessary.

The case was submitted to a jury and the following verdict was rendered:

"(1) Was the machine in question so defective or out of repair at the time of the accident as to render the punch liable to fall a second time without pressure upon the treadle? *Answer.* Yes. (2) If your answer to question No. 1 be 'Yes,' then did the defendant have such notice of such defect or want of repair that by the exercise of ordinary care and diligence it might have remedied it before the plaintiff was injured? *A.* Yes. (3) If your answers to questions 1 and 2 be 'Yes,' then was the defendant guilty of any want of ordinary care in permitting the use and operation of said machine by the plaintiff in the condition it then was? *A.* Yes. (4) Did the defendant instruct and caution the plaintiff before he began work upon the machine in question as to the dangers incident to its operation? *A.* No. (5) Was the defendant guilty of any want of ordinary care in relation to instructing and cautioning the plaintiff as to the dangers incident to the operation of the punch press in question? *A.* Yes. (6) Did the defendant provide plaintiff with any tools or appliances for the purpose of taking work out of the machine? *A.* No. (7) If your answer to question No. 6 be 'No,' then was the defendant guilty of any want of ordinary care in failing to furnish such tools or appliances? *A.* Yes. (8) If your answer to questions 1, 2, and 3 be 'Yes,' then was such want of ordinary care on the part of the defendant in allowing the machine to be used in such defective condition or while in want of repair the proximate cause of the injury? *A.* Yes. (9) If your answer to question 5 be 'Yes,' then was the failure of the defendant to instruct and caution the plaintiff as to the dangers incident to the operation of the machine the proximate cause of the injury? This question is not to be answered if your answer to question 8 be 'Yes.' (10) If your

answer to question 7 be 'Yes,' then was the failure of the defendant to furnish the plaintiff with tools and appliances for the purpose of taking the work out of the machine the proximate cause of the injury? If you answer questions 8 or 9 'Yes,' this question should not be answered. (11) Was there any want of ordinary care on the part of the plaintiff which contributed to produce the injury? *A.* No. (12) Did the plaintiff assume the risk incident to the operation of the machine in the manner in which he operated it? *A.* No. (13) What sum will compensate the plaintiff for the injury which he suffered? *A.* $5,000."

Defendant moved to strike out the affirmative answers to questions 1, 2, 3, 5, 7, and 8 because they were contrary to the evidence, and that the court answer them in the negative; also to strike out the negative answers to questions 11 and 12 because they were contrary to the evidence, and that the court answer them in the affirmative; and for reduction of the damages found, as not supported by the evidence. This motion was denied and exceptions taken. Defendant also moved for a new trial upon the grounds covered by these specific exceptions. This was denied. Judgment was awarded in plaintiff's favor on the special verdict for the amount assessed as damages and for costs. This is an appeal from such verdict.

For the appellant there was a brief by *Olin & Butler,* and oral argument by *H. L. Butler.*

For the respondent there was a brief by *Gilbert & Jackson,* and oral argument by *Russell Jackson.*

The following opinion was filed December 12, 1906:

SIEBECKER, J. It is urged that there was no evidence showing negligence in the particulars alleged. Defendant claims that the accident is alleged to have occurred through the abnormal dropping of the punch, with the application of pressure to the treadle after the punch had returned to its stationary position, that it then dropped unexpectedly, and thereby caused the injury. Plaintiff's counsel contest this

claim in their oral argument though their brief seems to go upon this theory. The question must be settled by the facts actually disclosed by the evidence. The record shows that plaintiff is the only person who speaks on this subject, and his statement is directly to the effect that the abnormal action of the machine at the time of the accident consisted in the second revolution of the crank shaft and a second dropping of the punch, without its automatically assuming a stationary position between the drops after the pressure had been removed from the treadle. Upon this basis of fact the question arises, Does the proof tend to show actionable negligence? Defendant contends that it does not, upon the ground that the only evidence of negligence presented is that of the alleged abnormal operation of the machine at the time of and at times previous to the accident. A number of persons testified that from several months to some days before the accident, while they had operated the punch or had seen it operated by others, it had unexpectedly failed in its automatic and regular action to take the normal stationary position after removal of pressure from the treadle, and had made one or more continuous abnormal drops. There is evidence tending to show that the shop foreman's attention had been called repeatedly to this abnormal action before the accident, and that he sought to remedy it by readjustment of its operating parts, and that he assured the person manipulating the press that it was in a proper condition for use. Considerable evidence was adduced to the effect that this press was of standard and approved design, and was in common and general use by manufacturers for purposes like to those for which this one was being used by defendant; that, so far as defendant's agents and servants knew, it operated properly before and from and after the time of the accident. It is urged that this state of the evidence of abnormal action of the machine can only be the basis of an inference tending to show an insufficiency in the construction and repair of the machine as the

producing cause of the injury complained of; that this was conclusively rebutted by the evidence showing the machine was free from all discoverable defects; and that therefore no grounds exist on which the jury could find that any defect existed in the machine which the defendant in the exercise of ordinary care ought to have discovered. The rule of law invoked by defendant as controlling upon this branch of the case has been observed and adhered to in numerous decisions of this court. In *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434, speaking of this subject, the court said:

"Undisputed proof of freedom of the machine from all discoverable defects, either in construction or repair, effectually overcomes any inference or presumption arising from the happening of the accident, so as to leave no question in that regard for the jury."

See, also, cases cited, and *Groth v. Thomann,* 110 Wis. 488, 86 N. W. 178; *Klitzke v. Webb,* 120 Wis. 254, 97 N. W. 901.

Plaintiff produced evidence tending to show that the operation of the clutch and trigger spring was interfered with by the gumming of these parts; that there was a wearing and loosening of the set-screw in the rocker arm holding the treadle rod; that this screw was not fastened by a lock nut; and that the treadle latch operated defectively, and claims that these defects in the construction and repair of the press were the cause of the accident; and that defendant could have discovered them in the exercise of ordinary care. It is obvious that the gumming could in no way cause the abnormal dropping of the punch, because its only effect would be to prevent engagement of the clutch and fly wheel; until this occurred the punch would be stationary. The specified abnormal action of the punch must result from a failure to disengage the clutch and fly wheel, and to this the gumming could in no way contribute. The theory that the absence of the lock nut on the set-screw, and the way the treadle latch was fastened up to prevent it from holding down the treadle, thereby causing

the punch to continue in action until it was removed, could in any way have caused the abnormal action complained of, is not sustained by the evidence. The evidence on these points would not reasonably admit of an inference that these alleged defects caused the abnormal action. Such an inference is mere conjecture and falls far short of the reasonable certainty required to show the real cause of the accident. As to these alleged grounds of negligence the court should have instructed the jury, as requested, that the evidence bearing on them was not sufficient to sustain a finding that the machine was defective, and that no want of ordinary care could be imputed to defendant with respect thereto as the cause of the injury. The failure to give the requested instructions or their equivalent was error. It permitted the jury to predicate their finding upon any or all of these phases of the evidence, and therefore renders the result of the trial inconclusive, in that the jury may have founded their finding of negligence upon a ground not supported by the evidence. *McClarney v. C., M. & St. P. R. Co.* 80 Wis. 277, 49 N. W. 963; *Davis v. C., M. & St. P. R. Co.* 93 Wis. 470, 67 N. W. 16, 1132.

The remaining alleged specific defect of the machine pertains to the worn and loose condition of the set-screw and treadle rod. There is evidence tending to sustain the claim that these conditions existed at the time of the accident. It is strenuously urged by the defendant that there is no explanation as to how these conditions could cause the abnormal action of the punch. We are led to the conclusion that it sufficiently appears from the evidence of witnesses qualified to speak on the subject that the looseness of the set-screw and the slipping of the rod in the rocker arm, when the operating parts of the machine were engaged in tripping and automatically arresting the punch and holding it in its stationary position, might cause the failure of the latch to return to its position and to engage the trigger at its first revolution, and thus by permitting two or more revolutions of the crank shaft

cause the unexpected drop of the punch after the pressure on the treadle had been removed. Some of the defendant's experts admitted that if the latch failed to return quickly this abnormal action might follow. Since it was made sufficiently apparent that the slipping of the treadle rod in the rocker arm, on account of the imperfect set-screw, might result in not returning the latch to such a position as to engage the trigger, this question should have been submitted to the jury upon the conflicting evidence on the subject, and the court should have submitted the inquiry of defendant's negligence upon this ground.

An exception is urged to the refusal of the court to submit questions covering different phases of the evidence concerning the nature of the defects, if the machine was found defective in construction or repair. We think they were properly refused, because they required the jury, in answering the general and proper questions respecting the alleged negligence of defendant, to state the specific grounds for their findings. *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816, and cases cited.

Error is assigned upon instructions given defining the measure of the master's duty. This duty requires that he exercise reasonable care in furnishing reasonably safe instruments, and that he exercise a like degree of care in making repairs. Another exception of this nature pertains to the definition of ordinary care of the defendant as such care as is exercised by ordinarily careful and prudent persons of plaintiff's age, intelligence, experience, and knowledge. The court manifestly misapplied this definition to the defendant, when it was intended to refer to plaintiff. The error is not likely to occur on another trial.

The exceptions to rulings on evidence relate mainly to infringements on the rights of cross-examination. Since a new trial must be granted, discussion of them is unnecessary. The exceptions do not present questions which show a mistaken

view of the principles, but relate to the application of well-established principles in the particulars suggested. The cross-examinations by defendant appear to have been too much restricted. A party should not be deprived of this right by so limiting the scope of the cross-examination that the value and weight of the evidence given on direct examination may not be fully tested.

It is further contended that counsel was permitted to indulge in improper argument to the jury, over defendant's objection. It appears that plaintiff requested a view of the machine at defendant's shops, and that this was assented to by the defendant; that the court, the jury, and counsel for both parties viewed and inspected the machine in the shop, and that it was operated at plaintiff's request in their presence; that plaintiff did not request the production of the machine or of any of its parts in court; and that defendant made no offer of it or of any of its parts as an exhibit during the trial. The machine was installed and in use in the factory; its size and weight evidently made it difficult to transport, and detachment of its parts would have prevented its use. Under these circumstances plaintiff's counsel argued that such absence of the machine and its detachable parts was evidence tending to show the defendant guilty of the negligence charged. The court upon objection to such comment ruled that defendant had the right but was not compelled to produce the machine, and that counsel justifiably argued that such nonproduction tended to refute defendant's claim that the machine was free from all discoverable defects. The serious effect of such comments before a jury is perfectly obvious. Was it proper argument under the circumstances? We cannot regard it as within the field of legitimate argument. It is a charge that defendant withheld evidence which would have supported plaintiff's claim and have refuted defendant's claim concerning the condition of the machine. Such an imputation was refuted by defendant's conduct in freely sub-

mitting to a full inspection of the machine and the operation of it in the presence of the jury and the opposite party and his counsel. It is not suggested that plaintiff was, in any particular, deprived of the fullest opportunity to examine the machine; nor did he ask that it or any of its parts be produced by defendant as an exhibit upon the trial. It appears that defendant had done everything within reasonable requirement to expose the machine to the view of the court and the jury as evidence of its condition at the time of the accident, and this conduct fully rebutted any presumption that it withheld the machine or any of its parts as evidence from sinister motives. The proceeding complained of was highly prejudicial under the circumstances, and constituted reversible error. *MacCarthy v. Whitcomb,* 110 Wis. 113, 85 N. W. 707, and cases cited; 1 Wigmore, Evidence, § 285 *et seq.; Bates v. Morris,* 101 Ala. 282, 13 South. 138; *Crawford v. State,* 112 Ala. 1, 21 South. 214.

Error is assigned upon the refusal of the court to direct a verdict in defendant's favor upon the ground that under the undisputed facts it appeared that plaintiff had assumed the risk of this injury as incident to his employment and that he was guilty of contributory negligence. Upon this question the justices are equally divided in opinion. In accordance with the established practice in the treatment of such a situation no opinion will be filed on this question.

By the Court.—Judgment reversed, and the action remanded for a new trial.

A motion for a rehearing was denied January 30, 1906.

BARINGER, Appellant, vs. EVENSON, Respondent.

November 17, 1905—January 30, 1906.

Fixtures: Landlord and tenant: Direction of verdict.

1. In determining whether articles in a building are fixtures, three things should be considered: (1) Actual physical annexation to the realty. (2) Application or adaptation to the use or purpose to which the realty is devoted. (3) An intention on the part of the person making the annexation to make a permanent accession to the freehold.
2. In an action by a landlord against a tenant for the value of certain shelving, drawer pulls, counters, screen doors, and a furnace removed by the tenant from the demised premises, on the evidence, stated in the opinion, it is *held* that the question whether the same were fixtures should have been submitted to the jury.
3. In such case certain of the articles were attached and used in and as forming a part of the store building when the defendant became a tenant. In the absence of any evidence disclosing a different state of facts, such articles are *held* to be the property of the landlord.
4. An incoming tenant should take care to ascertain that he will have a good title to any fixtures he purchases from the outgoing tenant.

APPEAL from a judgment of the circuit court for Sauk county: E. W. HELMS, Judge. *Reversed.*

This action was brought to recover $350 damages for the conversion of certain articles which the plaintiff claims were fixtures in the building and premises described and owned by him and which had been occupied by the defendant as a drug store for many years, and which articles, the defendant claims, were not fixtures, but were personal property and belonged to him. It appears, and is undisputed, that one William H. Hopkins was the owner in fee of the building and premises described as early as 1886; that in that year he leased the store building in question to one Charles Whitman to be used by him as a drug store, etc.; that Charles Whitman continued

to occupy said building as a drug store and as the tenant of Hopkins until about September 1, 1889, when J. H. Whitman purchased said stock of drugs from Charles Whitman, and continued to occupy said building as a drug store as the tenant of Hopkins from that time until September, 1890, when the defendant herein purchased said stock of drugs from J. H. Whitman and continued such occupancy of said building as a drug store as the tenant of Hopkins under a verbal lease from that time down to April 1, 1895, when Hopkins gave to the defendant a written lease of the premises described, duly executed under their hands and seals, with the privilege of renting the rooms on the second floor for office purposes, to have and to hold the same for the term of five years from April 1, 1895, at the rate of $750 per annum, payable in instalments of $62.50 monthly in advance—to be used for the purpose of a drug store and offices; that the defendant therein agreed to pay such rent and keep the premises in good repair, and to quit and deliver up possession thereof peaceably and quietly to said Hopkins or his legal representatives at the expiration of said term in as good condition as when received, the natural wear and reasonable use thereof and destruction by the elements and fire excepted; that Hopkins or his representatives might at all times re-enter the premises for inspection and making of such alterations and changes therein as he might deem advisable; that if the lessee made any alteration in the premises without the consent of the lessor, then he was liable to be expelled therefrom forthwith; that, in case the premises should be sold during the term, then the lessor was to have the optional right to terminate and cancel the lease by giving notice thereof to the lessee, who should thereupon vacate the premises; that if the lessee should use the premises contrary to the conditions of the lease or injure the same, then the lessor or his legal representatives would be entitled to immediate possession and have the right to recover all damages sustained by the acts of the lessee, and the covenants therein

contained were thereby made mutually binding on the parties, their representatives, executors, administrators, and assigns; that that lease by its terms expired April 1, 1900; that May 4, 1901, the plaintiff purchased the premises from Hopkins and received a deed thereof from him; that the defendant without any other written lease continued to occupy the premises as such tenant under Hopkins down to the time of such purchase by the plaintiff, and from that time down to about April 1, 1904, as tenant under the plaintiff, when he removed therefrom, as alleged in the complaint, twenty glass doors, certain shelving, one hundred and ninety drawer pulls, ten panes of glass, three screen doors, one transom screen, and two sections of counters, of the alleged aggregate value of $106, and all of which the complaint alleges were in the building and attached thereto at the time the premises were so occupied by J. H. Whitman in 1890; and also that one furnace was placed in the building by the defendant and attached thereto in the usual manner by means of air ducts constructed with it and connected with the other parts of the building, and said furnace rested upon a brick foundation in the cellar of the building and built for that special purpose and no other. To the complaint alleging such facts, in effect, the defendant answered by way of admissions, denials, and counter allegations, to the effect that he was the absolute owner of the several articles mentioned, and that the same, with the exception of the furnace, had been in his continuous possession and control from September, 1890, until the time of drawing the answer, and the furnace from the time it was put into the building by the defendant in the fall of 1898. At the close of the testimony the court directed a verdict of no cause of action in favor of the defendant. From the judgment entered upon that verdict with costs, the plaintiff appeals.

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

Bentley & Kelley, for the respondent.

CASSODAY, C. J. 1. The important question presented is whether the evidence was sufficient to take the case to the jury on the question whether any of the articles mentioned were fixtures, and hence a part of the realty and the property of the plaintiff. It is conceded that all the articles mentioned, except the furnace, were in the store building when the same was occupied by the defendant's immediate predecessor, J. H. Whitman, in 1890, and continued in the store from that time down to the time they were removed by the defendant about April 1, 1904, and that the furnace was placed in the building by defendant in the fall of 1898 and remained there until it was removed by the defendant about April 1, 1904. The defendant, as an adverse witness, testified to the effect that the twenty glass doors which he removed were fastened by means of hinges and screws to the standard in front of the shelving in the room; that there were two doors to a set—ten double doors, twenty single doors; that the hinges were screwed onto the upright strip in front of a standard between the shelving, composed of boards, and attached to and supported it; that the shelving he removed was not nailed to the building proper, but was nailed to cleats, and the cleats were screwed to the building; that he did not place the shelving in the building; that it was there when he went into possession in 1890; that he removed such of the sixteen dozen drawer pulls as had not previously been destroyed; that such drawer pulls were fastened to the drawers, and each consisted of a piece of metal projecting out probably an inch from the drawer, with a place to put the hand underneath, and had an opening in front for a glass label; that those pulls were fastened to the drawers with screws and constitute a part of the fixtures, and were there when Whitman occupied; that he removed some common panes of glass which had been set in places or panels cut out of the counter for the purpose, the glass taking the place of the panels; that he left the counter, but took the glass; that he did not know whether the counter was fastened to the

building or the floor; that he removed three screen doors and a transom screen, which were fastened to the building, the same as any other ordinary screen door is attached, with regular butts; that there was a strip attached to the building, and then the door attached to the strip; that they were made expressly for the doorways; that he removed one section of counter from the building, and a prescription case, also, that had a counter attached, both of which were there before he occupied; that neither was attached to the floor in any way, but simply rested thereon; that he removed the portable furnace which he placed in the building in the fall of 1898; that the furnace had a galvanized jacket and sat on some bricks that rested on the ground; that there was one hot-air register and a square pipe went right straight up to it and lapped over onto the rim; that there was a cold-air box extending from the front of the store to the bottom of the furnace; that when the furnace was put in he had a hole cut in the floor of the building to put in the register and the cold-air duct, and cut a hole in the wall in order to let the cold-air duct through; that he removed the hot-air pipe and the cold-air duct, but not the register; that the furnace was in the basement, and the hot air was conducted through the opening in the floor of the store.

Without reference to other evidence on the part of the plaintiff, we are clearly of the opinion that the court improperly directed a verdict in favor of the defendant. The case presents two questions for consideration. One is as to the right of defendant to remove from the building the furnace which he put in the building five and one-half years prior to such removal. This court has repeatedly declared that, in determining whether articles in a building are fixtures, three things should be considered:

"(1) Actual physical annexation to the realty; (2) application or adaptation to the use or purpose to which the realty is devoted; (3) an intention on the part of the person making

the annexation to make a permanent accession to the freehold." *Taylor v. Collins,* 51 Wis. 123, 127, 8 N. W. 22; *Homestead L. Co. v. Becker,* 96 Wis. 206, 210, 71 N. W. 117; *Gunderson v. Swarthout,* 104 Wis. 186, 190, 191, 80 N. W. 465; *Fuller-Warren Co. v. Harter,* 110 Wis. 80, 86, 85 N. W. 698; *Vanasse v. Reid,* 111 Wis. 303, 87 N. W. 192; *Rinzel v. Stumpf,* 116 Wis. 287, 290, 291, 93 N. W. 36.

As stated in several of these cases, such intention is to be regarded of primary importance as between grantor and grantee, mortgagor and mortgagee. See cases cited in *Gunderson v. Swarthout,* 104 Wis. 186, 191, 80 N. W. 465; *Fuller-Warren Co. v. Harter,* 110 Wis. 80, 85 N. W. 698; *E. M. Fish Co. v. Young, post,* p. 149, 106 N. W. 795. The same is true as between the owner of the realty and the vendor of personal property who sells the same with the intention of having it permanently annexed to the freehold and it is so annexed. In addition to the cases cited above, see *Frankland v. Moulton,* 5 Wis. 1; *Cooper v. Cleghorn,* 50 Wis. 113, 122, 6 N. W. 491; *Kendall Mfg. Co. v. Rundle,* 78 Wis. 150, 47 N. W. 364. In the most recent case cited above (*Rinzel v. Stumpf,* 116 Wis. 287), the action was brought by a subcontractor to enforce a mechanic's lien for certain shelving, counters, or tables which were placed in the building by him. The shelving was of different lengths and widths and made to conform to the contour of the inside of the store, and nailed to the walls and floor so as to make the same stationary and permanent, although it could have been removed without any serious injury to the building; and it was held that such shelving was "a part of the freehold." As to the twenty-four tables furnished by such subcontractor, all but two of them were not connected nor attached to the freehold, but were loose and movable, and hence were held not to be a part of the freehold nor lienable. As to the two tables which were glued around a post in the store, it was held that they became a part of the realty and lienable. *Rinzel v. Stumpf, supra.*

The questions here presented are as to the rule between landlord and tenant. The trial court held that the defendant had such right of removal, basing his decision upon an opinion of this court written by the late Justice TAYLOR. *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, 504, 34 N. W. 514, 515. The learned trial judge thought that decision was out of harmony with authorities elsewhere; and it is certainly true as to adjudications in certain jurisdictions. 1 McAdam, Landl. & T. (3d ed.) § 220, and cases there cited. But the *Merrill Case* adjudicates in respect to property, and we are constrained to follow such adjudication. The case is complicated in its facts, but, briefly stated, they are to the effect that in 1881 the Rock River Paper Company, being the owner of certain lots and water power, with a large stone building thereon known as the machine shop, with no machinery therein, and another building known as the foundry, with a very little machinery therein, leased the same to O. E. Merrill, who went into possession as tenant, and he and the O. E. Merrill Company, under such lease, placed upon said premises at their own expense all the machinery in controversy, consisting of "a boiler, engine, shafting, and various other machinery and tools," of equal or greater value than the realty so leased. October 4, 1883, the Rock River Paper Company entered into a written agreement with such tenant, reciting that during his occupancy under and by virtue of such lease he had built, constructed, erected, and put into and upon said premises such "boiler, engine, shafting, and various other machinery and tools," and it was therein agreed that the same should "be and remain the property of said" tenant; and that he should "have the right and privilege to remove or cause the same to be removed at any time during the time he" should "occupy said premises by virtue of any lease from" the Rock River Paper Company "and within a reasonable time after the expiration of any such lease," in a manner to do as little damage as possible, unless the Rock

River Paper Company or its assigns should, in the meantime, purchase the same. Such written agreement was executed by the respective parties under seal and duly witnessed and acknowledged and recorded. November 3, 1883, the Rock River Paper Company made a voluntary assignment of all its property to one Hackett for the benefit of its creditors. In pursuance of an order of the circuit court in such insolvency proceedings, the premises were sold by such assignee to the plaintiff bank, December 30, 1884, and the amount of the purchase price credited on its claim against the Rock River Paper Company, and such sale was duly confirmed by the court. Merrill remained in possession, as such tenant, under the old lease, until February 28, 1885, when the bank gave him a new lease to expire January 1, 1886, at a rental payable monthly. November 23, 1885, Merrill, with the written consent of the bank, assigned the new lease to the Merrill Company, and the same was extended by agreement to July 1, 1886, and that company remained in possession as tenant of the bank under the new lease so extended, and thereafter and until the action was brought by the bank to restrain the Merrill Company from removing such boiler, engine, shafting, and other machinery and tools. The trial court held that the bank never became the owner of such machinery and fixtures, and that judgment was affirmed by this court. The decision of this court was based upon the intention of the parties as evinced by the evidence in the case. And so it was in effect held that as the original lease only covered the lots, buildings, and water right, and the rent reserved was clearly not based upon the value of such trade fixtures put in by the lessee, whose right to the same had been expressly sanctioned by the lessor, and in selling the premises the assignee in the insolvency proceedings did not offer for sale nor profess to sell such fixtures, and the purchaser bought with knowledge that he was to acquire no title thereto and that such fixtures were claimed by such tenant, and such claim was acquiesced

in by the silence of such purchaser, therefore the bank, as such purchaser at the bankrupt sale, got no title to such fixtures. And so it was further held, in effect, that as the new lease was taken by the tenant while in the actual possession of the premises, and "merely described the land and buildings and the water right, and did not in clear terms cover such fixtures or refer to them, . . . the acceptance of such new lease did not divest the lessee of his right" to remove such fixtures. In reaching such conclusion it is said in the opinion "that the great preponderance of the evidence in this case clearly shows that it was understood that the tenant's right to his fixtures and machinery should remain in him notwithstanding the acceptance of a new lease." And it was then said that such discussion was based upon the facts appearing in the record, and would not be conclusive if it should be shown upon the trial that the facts were different. 69 Wis. 520, 521, 34 N. W. 522. See 1 McAdam, Landl. & T. (3d ed.) § 220, pp. 746, 747. In a later case it was held by this court that:

"The tenant of land having abandoned the premises without removing a building placed thereon by him, one who afterwards purchased the building from him cannot remove it unless, by some agreement with the owner of the land, the right of removal was preserved until after possession was given up by the tenant." *Fitzgerald v. Anderson,* 81 Wis. 341, 51 N. W. 554.

In a still later case, a section foreman of a railway company, living by its permission in the section house, built a lean-to kitchen addition thereto, with the knowledge and consent of the company; and it was held that such addition became a fixture which the tenant had no right to remove after his discharge by the company and removal from the house. *Mueller v. C., M. & St. P. R. Co.* 111 Wis. 300, 87 N. W. 239.

The question whether in the case at bar the defendant had

the right to remove the furnace must depend upon the evidence to be adduced upon the trial and the law applicable. According to the defendant's testimony, mentioned, he placed the furnace in the building in the fall of 1898 and while he was occupying the premises under the written lease. That lease by its terms expired April 1, 1900. After that, and under our statute, he seems to have held the premises as "a tenant from year to year upon the terms of the original lease" (sec. 2187, Stats. 1898). *Brown v. Kayser,* 60 Wis. 1, 18 N. W. 523; *Eimermann v. Nathan,* 116 Wis. 124, 92 N. W. 550. Both parties state that the defendant removed from the building in the spring of 1904. The precise time of removing the furnace is not given. From the testimony of the defendant it would seem that the furnace was actually annexed to the realty. It seems to have been adapted to the use or purpose to which the realty was devoted. Whether it was the intention of the parties that such annexation of the furnace to the realty should become a permanent accession to the freehold may be open to controversy. Whether there was any agreement in respect to the ownership of the furnace and the right to remove the same does not appear. The case was taken from the jury and the verdict directed in favor of the defendant. We must hold that there were questions of fact which should have been submitted to the jury.

2. The question whether the defendant had the right to remove from the building any of the articles mentioned which were in the building before the same was occupied by him involves some other principles of law. The difficulty of determining "what are fixtures that belong to the realty and what are, as to the tenant, removable chattels," is fully recognized by a late writer on the subject. 1 McAdam, Landl. & T. (3d ed.) § 216. The reason given for the difficulty is that such fixtures "stand upon the boundary line between the two grand division of things, real and personal, into which the law has classified property." Id. Then, after stating that the law is

more indulgent to the tenant than to the executor, the grantee, or the mortgagee, he says: "The incoming tenant should take care to ascertain that he will have a good title as against his landlord to any fixtures he purchases from the outgoing tenant." Id. In general it may be said "that what a tenant has added he may remove, if he can do so without material injury to the premises, unless he has actually built it in, so as to make it an integral part of what was there originally. But things affixed to the house in a more permanent manner, such as hearthstones, doors, and windows, he cannot, as a rule, take away, because such things are peculiarly adapted to the house in which they are fixed, and it would materially injure the freehold to take them away." Id. § 218.

Upon the facts disclosed in the record we must conclude that when the defendant became the tenant of Hopkins in 1890 he took the premises as the property of Hopkins, including the articles thereto attached or used as and forming a part of the storeroom and building, and that the written lease from Hopkins to him of April 1, 1895, ratified and confirmed such rights of property in Hopkins, and that such property and rights of property passed to the plaintiff by purchase and deed from Hopkins May 4, 1901. The covenants contained in the written lease, mentioned, by their terms bound the "respective heirs, executors, administrators, and assigns" of the parties thereto. A retrial may disclose a different state of facts. We have only attempted to indicate the principles of law applicable to the facts in the record as a guide upon a new trial.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

GODFREY, Appellant, vs. GODFREY, Respondent.

December 14, 1905—January 30, 1906.

New trial: Verdicts: Discretion.

1. Where it is apparent from an order granting a new trial that the trial judge was of the opinion that the verdict was contrary to the evidence, and there is evidence strongly tending to show that a note sued on was without consideration and never delivered, the order is one which the lower court has a right, in its discretion, to make, and will not be disturbed unless it clearly appears that there was an abuse of discretion.
2. While, on a motion for a new trial, the trial court has some discretion in the matter of costs, where a new trial is ordered on the ground that the verdict is contrary to the evidence it should be granted only on terms.
3. In this case, on the record, it is *held* that the new trial was granted because the verdict was contrary to the evidence; that there was nothing indicating that the trial court regarded the verdict as perverse, and hence that reasonable terms should have been imposed.
4. MARSHALL, J. (dissenting), is of the opinion that the verdict was perverse, and hence that a new trial should have been granted without terms.

APPEAL from an order of the circuit court for Rock county: JAMES J. DICK, Judge. *Reversed.*

This action was brought to recover upon a promissory note. The trial resulted in a verdict and judgment for plaintiff. The court ordered a new trial, on motion of defendant, on the ground that "said verdict was against the law, contrary to the instructions of the court, and unsupported by the evidence," and ordered that costs abide the event of the action. The plaintiff appealed from the order, and complains that the court erred (1) in granting the motion, and (2) in ordering costs to abide the event of the action.

William G. Wheeler, for the appellant.

For the respondent there was a brief by *Fethers, Jeffris, Mouat & Newhouse,* and oral argument by *L. A. Avery.*

KERWIN, J. 1. The evidence, but not the charge, is preserved in a bill of exceptions. It is claimed on the part of the plaintiff that the court abused its discretion in setting aside the verdict and granting a new trial, and that the evidence fully supports the verdict. There is evidence strongly tending to show that the note was without consideration and never delivered. It is apparent from the order made by the judge below in granting the new trial that he was of the opinion that the verdict was contrary to the evidence. Under such circumstances the lower court had the right in its discretion to grant a new trial, and we cannot see that such discretion was abused. Such action will not be disturbed unless it clearly appears that there was an abuse of discretion. *Eggen v. Fox,* 124 Wis. 534, 102 N. W. 1054; *R. Connor Co. v. Goodwillie,* 120 Wis. 603, 98 N. W. 528.

2. Error is assigned because of failure to order costs paid as condition of new trial. It is claimed by counsel for respondent that matter of costs on motion for new trial is within the discretion of the trial court. The trial court has some discretion in the matter, but where a new trial is ordered on the ground that the verdict is contrary to the evidence this court has held that a new trial should be granted only on terms. *Becker v. Holm,* 100 Wis. 281, 75 N. W. 999; *Wolfgram v. Schoepke,* 123 Wis. 19, 100 N. W. 1054; *R. Connor Co. v. Goodwillie, supra.* On the record before us we hold that the new trial was granted because the verdict was contrary to the evidence, and therefore reasonable terms should have been imposed as a condition thereof. *Becker v. Holm, supra; Wolfgram v. Schoepke, supra.* There is nothing in the record indicating that the court regarded the verdict perverse.

By the Court.—The order is reversed, and the cause remanded with instructions to the court below to embody in the order granting new trial the payment of reasonable terms by defendant as a condition.

MARSHALL, J. (*dissenting*). I dissent from the reversal of the order because costs were not imposed on respondent. Our practice as to this subject has drifted far away from that which prevailed when the Code was adopted, and which was intended to be firmly intrenched therein. The trend of evolution has been in the direction of increasing the burdens to be borne by sufferers from unjust verdicts. It has progressed so far, it seems, in that direction as to seriously interfere with the proper administration of justice. The additional step in that regard, taken in this case, moves me to write this history of the matter showing the necessity which exists, in my judgment, for a return to the anchorage of the written law. Our present practice is inconsistent with the Code, inconsistent with that here subsequent to the Code till within recent years, contrary to that in many, and I think most, jurisdictions having a similar Code, and has no logical foundation to support it.

The tendency should be to soften the arbitrary rule that none but a dishonest verdict, which is wrong as contrary to the evidence, can be set aside and a new trial granted, except upon terms, rather than to harden it. It were better, in my judgment, to do away with it altogether. No reason has been assigned here during the history of the court and none, we venture to say, can be found elsewhere for making the victim of an unjust verdict,—in that it is so clearly contrary to the great weight of the evidence and the law as given by the court as to indicate mistake, bias, or something worse,—pay his adversary for the privilege of another opportunity to submit his grievance to the judgment of a jury. The administration of impartial justice is the great primary principle upon which our judicial system should be grounded. That is what courts exist for. They should not tolerate practice rules inconsistent with the purposes of their existence,—rules which rightly or wrongly suggest a purpose to deter persons whose rights

have been violated from invoking the law of the land for relief. The attitude of courts should be one of invitation to those who have wrongs to be redressed to pass their portals, rather than that of a despot grudgingly dispensing favors for a consideration paid to the alleged wrongdoer. Such is the spirit of the Code. Such is the trend of modern thought. This arbitrary exaction from a blameless party for the benefit of his adversary has an appearance of discouraging litigation by making it burdensome regardless of the merits of the case. True, there is no such conscious purpose here, but anything like the appearance of such a purpose, all will agree, should be avoided.

The power of courts to relieve from unjust verdicts is inherent in their jurisdiction, though it is often regulated by statute, as it was designed to be here. That power was recognized at a very early date as essential to guard against possible mistakes, ignorance or bias of jurors, or errors of the court. There are instances on record of its exercise as early as the reign of Edward III. 3 Bl. Comm. 388. It became later a matter of English statutory law. Blackstone thus wrote of it in his day: "Granting a new trial" cures all "inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision which is the glory of the English law." 3 Bl. Comm. 391. When that was written the arbitrary rule under discussion had not taken shape. Courts were not supposed to be powerless to unconditionally set aside a clearly unjust verdict, in that it was against the great weight of the evidence or the law as given by the court, though not dishonest, except upon condition of the sufferer being mulcted in costs for the benefit of his adversary. They exercised the broadest discretion in cases of strong probability that the decision of the jury was not in accord with the justice of the case.

If we find ourselves today with a rule of judicial making, contrary to the spirit of the Code and wrong in principle, in

that it tends to defeat the real purpose of the judicial system, it is a practice regulation which may readily be changed by the same means it has grown to its present state. Why should the courts stand guard at their portals, preventing faultless sufferers from unjust verdicts, that stop short of dishonesty, from having the opportunity, at least, for redress till they have paid their adversary a consideration? Let us examine the history of the matter in search of an answer.

Prior to the Code in New York its courts commonly held to a very rigorous rule on the subject under discussion. There was supposed to be an inflexible one requiring the imposition of costs on the moving party as the terms of setting aside a verdict as contrary to the evidence. It was applied in cases of what was denominated here in the beginning, perverse verdicts. In view of that, doubtless, the Code makers as part of what was designed to be a new and complete system of procedure, including the regulation of costs, provided as follows:

"The judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial . . . for insufficient evidence." Sec. 264, Ann. Code N. Y. 1871.

Note the absence of any express regulation of costs. That was left entirely under control of the trial judge as a part of his discretionary authority, thus enabling him to consider the facts of each case and impose costs or not according to the justice of the matter. The arbitrary rule thus intended to be efficiently abrogated, still persisted for the same reason that many purposes of the Code makers failed partly or wholly. The bench and bar, to a considerable extent, did not receive the new system kindly. So a body of judicial law was soon created treating it as a mere supplement to, or statutory recognition in part of, the old system. In harmony with that the old rule was treated as not having lost any of its vitality. It was applied regardless of whether the verdict was perverse in the sense of being characterized by mere bias or mistake.

It was administered so as to warrant the belief that nothing short of substantially a dishonest verdict was deemed sufficient to warrant a new trial without terms. *Richards v. Sandford,* 2 E. D. Smith, 349, and *Collins v. Albany & S. R. Co.* 12 Barb. 492, are good illustrations. An examination thereof will disclose that the verdicts were perverse, as we shall hereafter define perversity. They are referred to as perverse, and yet costs were imposed on the moving party. Instances are found indicating that in those days judges sometimes reluctantly applied the rule as it was then understood, but felt bound to do so, not recognizing that the Code pointed a way out of the difficulty.

In *Harris v. Panama R. Co.* 5 Bosw. 312, there was no question but what there was some evidence, in mere words, supporting the verdict. The jury probably decided honestly, yet the evidence preponderated so strongly a contrary way as to clearly indicate that their judgment was turned aside (perverted as we shall later show) in some way from the truth of the matter. The case was quite as strong as some found in our books where it was held that the verdict was perverse. A new trial was granted at the costs of the moving party. WOODRUFF, J., said:

"I have never fully appreciated the justice of a rule which requires the party, in whose favor a new trial is ordered, to pay the costs if the error be deemed the error of the jury; but I suppose it to be too well settled to be at present disregarded."

As we shall see later, the New York doctrine in time took deep root here, though at a late day.

At the outset in this jurisdiction costs were imposed on the moving party on relieving him from a verdict which was contrary to the evidence, or the law as given by the court, or both, wholly as a matter of judicial discretion. The discretion went to the subject of terms as well as the granting of the new trial. No arbitrary requirement as to costs was recognized.

Territory v. Doty, 1 Pin. 396 (decided 1844), and *Baxter v. Payne,* 1 Pin. 501, sufficiently evidence that. Some of the most distinguished counsel of the day participated in the first case cited. On one side it was claimed that, where the moving party who was without fault was entitled to a new trial, he was so entitled unconditionally whether the infirmity in the verdict was insufficiency of evidence or disregard of the law of the case. On the other the most that was claimed was, as indicated in the language of counsel, embodied, in effect, in the report of the case, thus:

"The practice in this country has been to impose terms as a condition of granting a new trial. The matter is entirely in the discretion of the court and cannot be error."

The court said:

"Generally a court in the exercise of its discretion, in disposing of motions for new trials, can make such order or grant the motion on such terms as may be just. But, when a verdict is set aside on the ground that it is against law and evidence, it should be done *without terms.* It is the duty of the jury to take the law from the court. It is the province of the jury to decide the facts, and of the court to decide the law. And if the jury should disregard the charge of the court upon the law of the case, it is the duty of the court to set aside the verdict *unconditionally.*"

We venture to say that such was supposed to be the law here from the beginning in 1842 to the adoption of the Code in 1856.

The Code makers in creating a new and complete judicial system for this state covering every subject, including that of the imposition of costs upon parties, adopted verbatim the language of the New York Code. Sec. 174, ch. 120, Laws of 1856. It is now found with one significant change in sec. 2878, Stats. 1898. As changed it reads thus:

"The judge before whom the issue is tried may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial . . . because the verdict is contrary to law or contrary to evidence."

The change, as will be seen, consists in adding "contrary to law." That is significant in that it is not in the New York Code, but accords with the practice here before and after our Code. The revisers explained their work thus: "Amended to express more exactly the practice adopted under the section as it has been."

The practice, as indicated, was wrought into the Code and was not thereafter called to the attention of the court till 1870, when it was treated in *Emmons v. Sheldon,* 26 Wis. 648. It is quite remarkable that neither court nor counsel referred to the early decisions here. Counsel for appellant recognized that the Code was intended to supersede the practice prior thereto, as appears from the printed brief. The court did not mention the statute but we assume must have had it in mind and probably our early decisions also, since it, in effect, rejected the doctrine of the early New York decisions to which we have referred. The facts were the same, in effect, as in *Richards v. Sandford,* 2 E. D. Smith, 349, which was called to the attention of the court, yet the order granting the new trial unconditionally was sustained, the court saying:

"The general rule doubtless is, to require the party obtaining the order to pay costs. It seems to us that this rule is not inflexible, to be adhered to in every possible case. But when, as in this case, the damages found by the jury are so small as to force upon the mind the conviction that by some means the jury acted under the influence of a perverted judgment, the court might properly relieve the party from the payment of costs upon granting his motion for a new trial. Such an exercise of judicial discretion would seem to be eminently wise in a case of a 'perverse verdict.' "

It is evident the court used the terms "perverse" and "perversity" in their ordinary sense: as indicating something quite short of even constructive dishonesty. If the court did not have in mind the previous decisions here, it doubtless did the existing practice and used the words "perverse" and "perversity" to distinguish between bias or mistake and an im-

partial intelligent application of the judgment of the jury to the evidence. In that sense, the case is in harmony with the early decisions. It should be particularly noted that the order granted was treated as in the field of discretion and yet the imposition of terms upon the moving party was treated as also within that field.

The matter was next referred to in *Carroll v. More,* 30 Wis. 574. The case is not of importance because the new trial was granted upon the ground of newly-discovered evidence.

Next comes *Pound v. Roan,* 45 Wis. 129. There discretionary authority to grant a new trial in a jury case without terms upon the ground that the verdict was against the evidence, was distinctly confined to perverse verdicts. The word "perverse" was evidently used in the same sense as in *Emmons v. Sheldon, supra.* That case was followed by *Smith v. Lander,* 48 Wis. 587, 4 N. W. 767; *Jones v. C. & N. W. R. Co.* 49 Wis. 352, 5 N. W. 854; *McLimans v. Lancaster,* 57 Wis. 297, 15 N. W. 194; *Eviston v. Cramer,* 57 Wis. 570, 15 N. W. 760. There is only this to be noted about those cases. In *Jones v. C. & N. W. R. Co.* the new trial was granted because the jury decided wrongly as to the weight of the evidence. No terms were imposed. The court distinguished between granting a new trial and failing to impose terms, holding that the former was discretionary but the latter not. In that we see the second distinct advance from the early rule. In *McLimans v. Lancaster* the order did not specify the ground. That was conceded to be insufficiency of evidence. No costs were imposed. The order was affirmed. In *Eviston v. Cramer* the record did not disclose the reason for the new trial. It was allowed at the costs of the moving party. The court said the granting of the order in that way was within the discretion of the trial judge, suggesting that the imposition of costs as well as granting the new trial were discretionary,—thus apparently taking a retrograde step.

The next reference to the matter is one of considerable sig-

nificance. It is *Kayser v. Hartnett,* 67 Wis. 250, 30 N. W. 363. The verdict was contrary to the decided weight of the evidence. It was characterized by bias or mistake, though not dishonesty. The court held that it was within the discretion of the court to grant a new trial unconditionally, citing the early cases where the word "perverse" was not used and the later cases where it was used, and remarking that they were in harmony. The irresistible inference from that is that Justice TAYLOR, who wrote the opinion, recognized the force of the Code provision and regarded the word "perverse" as referring only to bias or mistake. He said: "When the verdict is clearly against the evidence, such new trial may be granted without terms." He was speaking of the facts before him, not of a case where there is such a want of evidence that a verdict ought to be directed.

The subject was next referred to in *Schweickhart v. Stuewe,* 75 Wis. 157, 43 N. W. 722. There the trial court did not impose costs but stated that the verdict was wholly unsupported by the evidence. The court said that was equivalent to deciding the verdict was perverse, the term "perverse" being used as descriptive of a species of dishonesty; something much worse than mere bias or mistake. The case at the close of the evidence was a proper one for the direction of a verdict contrary to that found by the jury. Here we find a significant departure from the practice that had existed for nearly fifty years.

The court next dealt with the matter in *Schraer v. Stefan,* 80 Wis. 653, 50 N. W. 778. No grounds were stated in the order. There was then engrafted onto the rule the idea that no ground for the order appearing therein or in the record, the presumption exists that it was granted because the verdict was against the weight of the evidence, rendering the imposition of costs on the moving party an arbitrary requirement. It was further held that a perverse verdict or one "entirely unsupported by the evidence" are exceptions to the rule re-

quiring the party moving for a new trial to compensate his adversary for the latter's costs of the previous trial as terms of a rehearing. Here we have a distinct recognition that a perverse verdict is not necessarily contrary to all the evidence. It may be tainted by prejudice or mistake only.

Next came *Garny v. Katz,* 86 Wis. 321, 56 N. W. 912. No reason for granting the new trial was stated in the order and no terms were imposed. In addition to supporting the rule as to the presumption being against the order, the granting of the new trial and the omission of terms were again treated as distinct matters, the former being a discretionary matter and the latter governed by an arbitrary rule.

Next we have *Wilson v. Eau Claire,* 89 Wis. 47, 61 N. W. 290. The order specified that the verdict was not supported by the evidence. The court held that was equivalent to saying it was against the weight of the evidence, and hence the order was erroneous because costs were not imposed on the moving party.

That was followed by *Becker v. Holm,* 100 Wis. 281, 75 N. W. 999, wherein the further element was added to the rule, that in case an order fails to show the grounds thereof the record may be examined for the presence or absence of evidence indicating whether the verdict is perverse. Further,—in the light of the way the term "perverse" seemed to have been regarded since *Schweickhart v. Stuewe,* the court sometimes saying, in effect, that it is a verdict wholly unsupported by the evidence, and sometimes that it is something different, though one so unsupported is equivalent to a perverse verdict,—it was said that the term meant a verdict tainted with something in the nature of dishonesty. It would seem that a verdict without any reasonable basis whatever to support it must partake of dishonesty, at least to the extent of reckless disregard of evidence. I think now that so far as the expression used in that case might be regarded as stating a limitation of the meaning of "perverse" it is too strong. It

went too far, as some previous expressions suggesting it did. What constitutes perversity, as generally understood in the law and as doubtless understood in the beginning of our judicial history and down at least to the *Schweickhart Case,* we will endeavor to show hereafter.

The next in order is *Mills v. Conley,* 110 Wis. 525, 86 N. W. 203. It is in harmony with the last case cited, in that entire absence of evidence to support the verdict was taken as the test of whether it was perverse. That was followed by *Giese v. Milwaukee E. R. & L. Co.* 116 Wis. 66, 92 N. W. 356; *Second Nat. Bank v. Smith,* 118 Wis. 18, 94 N. W. 664; *R. Connor Co. v. Goodwillie,* 120 Wis. 603, 98 N. W. 528. In the *Giese Case* this term was used: "If the new trial be granted because the verdict be perverse or entirely unsupported by the evidence, or because of errors of the court, costs should not be imposed." In the *Bank Case* the idea in *Schraer v. Stefan,* as to the presumption in case of an order stating no grounds and imposing no terms being against it, was changed so as to support it.

The next occasion for treating the matter was in *Wolfgram v. Schoepke,* 123 Wis. 19, 100 N. W. 1054. It was held that in case of setting aside a verdict in the field of discretion terms should be imposed. That added a new element. It had not theretofore been said that the court was powerless in all such cases to deal with the question of costs favorable to the moving party. It is rather confirmatory of the idea that a perverse verdict must be regarded as substantially dishonest. The idea expressed in *Giese v. M. E. R. & L. Co., supra,* as to the presumption being in favor of the order, nothing appearing to the contrary, was restated. It should be further noted that it is said some reasonable terms should be imposed as a condition of the new trial, suggesting that the terms need not necessarily be the costs of the previous trial. That is in harmony with the Code, and contrary to the rule in previous cases. The *Wolfgram Case* made a further change in the ex-

isting rule, in that the idea in *Wilson v. Eau Claire,* 89 Wis. 47, 61 N. W. 290, that the expression "unsupported by the evidence" is synonymous with "against the weight of the evidence," was superseded by the idea that, aided by the presumption, it is synonymous with wholly unsupported by the evidence or perverse.

The language in the opinion before us indicates that the court has returned to the doctrine of *Schraer v. Stefan, supra,* and gone one step further than any previous decision. The verdict was set aside as "against the law, contrary to the instructions of the court, and unsupported by the evidence." It might have all those infirmities and not be perverse. It could not be perverse without having one of them. In the absence of anything efficiently changing the matter the presumption is in favor of perversity. Nothing in that regard appears in the opinion. It was competent to examine the record for evidence of some sort in favor of the verdict which could be pointed to as rebutting the presumption. The opinion is silent on that subject. It says there was strong support in the evidence of respondent's contention, but fails to state there was contrary evidence. An examination of the record suggests that the trial court may well have been in some doubt as to whether there was any such evidence. So no reason is given why the presumption in favor of the order should not prevail. Further, the element as to the verdict being contrary to the instructions of the court is not alluded to in the opinion. A jury may act perversely respecting the judge's instructions as well as in regard to the evidence. The presumption in favor of the order reaches that field. The charge not being in the record there is no way of rebutting such presumption.

The idea that a verdict contrary to the judge's charge is not to be regarded as perverse adds a new burden to a faultless litigant suffering from an unjust verdict, as regards obtaining a rehearing. It is directly contrary to the early de-

cisions and not supported by any subsequent one, as far as I can find. It will be kept in mind, at this point, that in *Territory v. Doty,* 1 Pin. 396, which has been often affirmed, as we have shown, it was said that in case of a verdict contrary to the judge's charge, it should be vacated unconditionally. For aught that appears here, the court may in terms or effect have instructed the jury to find for the defendant. The evidence is such that we are constrained to say the trial court may have taken that view of it.

I should say in fairness to my brethren, they believed there was an erasure in the order and some evidence in favor of the plaintiff, in the record, which was sufficient to rebut the presumption in favor of respondent. The word "perverse," at the outset, appeared in the draft of the order preceding the specification of the grounds we have indicated. It was stricken out before signing. That was thought to indicate unwillingness of the circuit judge to say the jury acted perversely. To my mind, the omitted word was regarded as adding nothing to the language used. I fail to find substantial evidence in the record warranting us in saying the trial court was clearly wrong if it held there was no basis therein for a verdict in plaintiff's favor.

Doubtless much of the confusion on the subject under discussion may be well attributed to insufficient attention to the meaning of the word "perverse." Perversity does not necessarily signify dishonesty, nor anything of that nature. It suggests a state of being moved consciously or unconsciously, most generally the former, to look at things from a wrong standpoint. Dishonesty signifies an intentional violation of the truth. Substantial dishonesty means a reckless or entirely inexcusable disregard of the truth. If a jury, disregarding the judge's charge, either from good motives or bad ones, or through prejudice or other cause, renders a verdict one way when the evidence clearly preponderates the other, they act perversely. It would be exceedingly unjust, how-

ever, to stamp all such conduct as characterized by dishonesty in any sense. A verdict which is the result of anything ulterior to a reasonably fair application of the judgment of the jury to the evidence and the law as given by the court, is perverse. Where a verdict is contrary to all the evidence it does not fall within the ordinary idea of perversity, as regards when a verdict should be set aside and a new trial granted, because in such cases there really is no jury question. Perversity as to a verdict, correctly speaking, relates to some ulterior influence upon a question in deciding a case involving a jury question and in relation thereto.

One of the latest text-book authorities puts the matter under discussion thus: "Where the verdict is perverse, *that is, so clearly against the weight of evidence or contrary to the evidence as to create a presumption of mistake or improper motives of the jury,* a new trial should be granted without imposing costs." 14 Ency. Pl. & Pr. 944, 945. Webster defines perverse as "turned the wrong way, not right; distorted from the right," and the like. The Century Dictionary gives this definition: "Turned away or deviating from what is right, proper, correct, etc.: 'The only righteous in a world perverse.'" Of course, the distinguished poet did not intend in that line to suggest the idea of a dishonest world. Rapalje gives this as the correct meaning of a perverse verdict: "A verdict whereby the jury refuse to follow the directions of the judge on a point of law." Bouvier defines a perverse verdict thus: "A verdict rendered by a jury which choose not to take the law from the judge, but will act on their own erroneous view of the law. In such cases, however honest the intentions of the jury may be, their verdict is perverse." Both of these definitions obviously carry the idea of inexcusable failure to view the evidence in the light of the law as given by the court.

In *Saunders v. Davies,* 14 Eng. L. & Eq. 532, various expressions were given on this subject. POLLOCK, C. B., de-

fined a perverse verdict in the language we have quoted from Bouvier. MARTIN, B., said: "I never could understand why parties are to pay costs where juries give verdicts contrary to evidence." POLLOCK, C. B., said further: "It is time that parties who are in no default whatever, and not responsible for mistakes committed in the administration of justice, should not be compelled to pay costs when they come to the court for redress." Thus it will be seen the English court regarded a verdict tainted with mistake or bias as perverse and subject to be set aside and a new trial granted without terms.

To recapitulate: At the outset in 1844 (*Territory v. Doty,* 1 Pin. 396) a verdict was deemed perverse if characterized by disregard of the court's instructions, or by bias, or anything whereby there was not some degree of fair application of the judgment of the jury to the case. It was not deemed to be necessarily contrary to all the evidence, nor tainted with anything in the nature of dishonesty. The manner of relieving from it where there was no such taint, and no disregard of the court's instructions, was not regarded as necessarily outside of the field of the discretion as to terms.

The situation stated was wrought into the Code in 1856.

Such situation was recognized without question till 1870, and was then re-intrenched in our judicial system. *Emmons v. Sheldon,* 26 Wis. 648.

In 1878 a dishonest verdict,—one consciously against the preponderance of the evidence,—as well as one tainted with prejudice, passion, or mistake, was treated as perverse (*Pound v. Roan,* 45 Wis. 129), the court however approving previous decisions.

In 1886 (*Kayser v. Hartnett,* 67 Wis. 250, 30 N. W. 363) a verdict so clearly against the weight of the evidence as to satisfactorily show bias or mistake; in other words, perversity untainted with dishonesty, was treated as within the field of judicial discretion, both as to a new trial and the terms thereof.

In 1889 (*Schweickhart v. Stuewe,* 75 Wis. 157, 43 N. W. 722) a verdict so contrary to the clear right of the matter as to suggest something worse than mere perversity, though spoken of as perverse and subject to vacation unconditionally on motion of the losing party, was classed with a disregard of the judge's charge.

In 1891 (*Schraer v. Stefan,* 80 Wis. 653, 50 N. W. 778) a mere perverse verdict, theretofore treated as redressible within the field of discretion, and a verdict entirely unsupported by the evidence (substantially dishonest) were put in the same class, the difference being overlooked, giving rise to the absolute right to a new trial in one case, and the discretionary control over the matter in the other. The presumption was said to be, nothing appearing to the contrary, against the existence of elements justifying omission to impose terms upon the moving party.

In 1894 (*Wilson v. Eau Claire,* 89 Wis. 47, 61 N. W. 290) the idea is found that "unsupported by the evidence" is equivalent to merely "against the weight of the evidence" and inconsistent with perversity.

In 1898 (*Becker v. Holm,* 100 Wis. 281, 75 N. W. 999) perversity was treated as necessarily involving some element akin, at least, to dishonesty,—a verdict tainted with passion, prejudice, or mistake being confused with one so clearly against all evidence as to suggest wilful disregard of the right of the matter.

In 1903 (*Second Nat. Bank v. Smith,* 118 Wis. 18, 94 N. W. 664) the presumption theretofore said to be against the order, no grounds thereof appearing therein or terms imposed, was changed to favor it on the subject of the existence of elements permitting the vacation of the verdict without imposing terms on the moving party.

In 1904 (*Wolfgram v. Schoepke,* 123 Wis. 19, 100 N. W. 1054) the idea was made prominent that when a new trial is granted within the field of discretion the moving party must bear the burden of his adversary's expenses of the former

trial, and the previous rule as to "unsupported by the evidence" being synonymous with "against the weight of the evidence" was changed to make it synonymous with "wholly unsupported by the evidence."

The last expressions of the court regarding presumptions being in favor of the order, where terms of the relief are not imposed on the moving party and the stated grounds for such order are want of support in the evidence and disregard of the court's instructions, and the absolute right of the matter in the latter circumstances, were overlooked so far as the opinion discloses.

What has been said as to general principles involved could be supported by many citations from elsewhere. To illustrate:

"The setting aside of judgments and granting new trials being within the discretionary power of the court, it follows that the court may attach such terms and conditions to the order, whether denying or granting a new trial, as he deems reasonable and just." 1 Abbott, Practice and Forms (Mich.) § 833.

"The terms upon which a court will grant a new trial are peculiarly a matter within its discretion. This must necessarily be so; for so many reasons relating to the conduct, management, and peculiar circumstances of the trial, may exist, that it would be impossible to prescribe any general rules on the subject." *Rice v. Gashirie,* 13 Cal. 53.

That the authors of the Code intended to establish a rule by written law along the lines suggested in the illustrations, seems plain from the wording of the statute and the state of the law at the time of its preparation. It is in harmony with reason and common sense. When the conscience of the court is so moved in favor of a faultless victim of an unjust verdict,—a verdict rendered under such conditions as to indicate plainly that it is tainted by bias, or mistake, or something worse,—as to decide that the sufferer shall have another chance to submit his case to the judgment of the jury, he

should no longer be regarded as a mere suppliant for judicial favor, but he should be competent to demand a re-submission of his case as a matter of right, not merely permitted to obtain that redress by paying his adversary for the privilege. That was the rule before the Code. The Code was not intended to change it, but rather to efficiently guard it.

There is no efficient obstacle in the way of departing from an established rule of practice. Where it has developed through a somewhat shifty course away from the safe anchorage of the Code and produces unnecessary and unreasonable hardship to litigants and difficulty for trial judges, an orderly and speedy return might well be attempted. In the situation in hand we might tie back to *Kayser v. Hartnett,* 67 Wis. 250, 30 N. W. 363, regarding all decisions up to that time as in harmony therewith, as said therein, retaining the side rules developed from time to time, which are favorable to a liberal and efficient administration. By so doing we would have about this situation:

1. The trial judge may, in his discretion, entertain a motion upon his minutes to set aside a verdict and grant a new trial for insufficiency of evidence or disregard of the court's instructions.

2. Such discretion includes the subject of imposing upon the moving party his adversary's costs of the former trial, or not doing so, according as justice seems to demand.

3. In case of the verdict being contrary to the weight of the evidence, a proper exercise of discretion will impose on the moving party his adversary's costs of the former trial.

4. In case of the verdict being merely perverse, in that the jury, though acting honestly, through passion, prejudice or mistake did not fairly apply their judgment to the evidence, whether to impose any burden upon the moving party as a condition of granting him relief is to be determined by the trial judge according to the justice of each particular case.

5. In case of the verdict being grossly perverse, in that it is

wholly unsupported by the evidence or contrary to the court's instructions, in other words, tainted with something akin to dishonesty, judicial discretion cannot act rightly on the subject of terms other than to vacate the verdict and grant a new trial unconditionally.

6. In case of an order setting a verdict aside and granting a new trial, but not specifying any grounds though imposing upon the moving party his adversary's costs of the former trial as a condition of the relief, the presumption is that the verdict was grossly, not merely, perverse.

7. In case of such an order not specifying any ground therefor nor imposing any terms on the moving party, the presumption is that the verdict was perverse.

8. Where the ground stated in the order therefor is that the verdict is unsupported by the evidence, the presumption is that it was wholly so unsupported, or that the state of the evidence and the circumstances were such as to show reasonably that the verdict was influenced efficiently by passion, prejudice, or mistake.

9. All reasonable presumptions are to be taken in support of the order, but any such presumption is susceptible of being rebutted by anything appearing in the record reasonably deemed to be sufficient therefor.

Applying those principles to the case in hand, without going further than they are in harmony with our recent decisions, the conclusion reached in this case seems to me to be wrong. In any event, the unrebutted grounds stated in the order, that the jury disregarded the court's instructions, stamps the verdict as grossly perverse, entitling the moving party to the unconditional order he obtained.

CARY, Respondent, vs. PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK, Appellant.

January 9—January 30, 1906.

Accident insurance: Liability: Exemptions: Proximate cause: Injury resulting from poison or infection: Bodily infirmity or disease.

1. In an action on a policy insuring against the effects of bodily injury caused solely by external, violent, and accidental means, one exemption from liability contained in the policy was: "This insurance does not cover any case of disability or death whatever, except where the claimant shall furnish to the company direct and positive proof that such disability or death resulted *proximately* and solely from accidental cause." It appeared from the evidence that the assured fell and sustained an injury to his leg which caused an abrasion of the skin, that bacteria, causing blood poisoning, entered his system through such abrasion, and that his death resulted therefrom. *Held:*

   (1) The term "proximately," employed in the contract, must be understood to have been used in its common and accepted meaning, as adopted and approved in the law under like conditions and circumstances.

   (2) The jury were warranted in their conclusion that the assured's death resulted proximately and solely from his accidental fall.
2. Responsible causation, as applied in the law, is not dependent on time, distance, or a mere succession of events.
3. A policy insuring against accidents, exempting the insurer from any liability for any injury "resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled," does not exempt the insurer from liability when accidental abrasion of the skin was the proximate cause of death, although bacterial poisoning intervened.
4. In such case the policy further exempted from liability for death "resulting either directly or indirectly, wholly or in part, from bodily infirmity or disease of any kind." *Held*, that the exemption did not apply to bodily infirmity or disease the result of accident, and, the facts justifying the conclusion that death resulted from accidental injury, the insurer was liable within the intent and meaning of this provision of the policy.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an appeal from a judgment rendered upon a special verdict in favor of plaintiff for $11,694.64 and costs in an action upon a policy of accident insurance. The defendant insured Eugene Cary against the effects of bodily injury caused solely by external, violent, and accidental means, and undertook to pay the insured the sum of $25 per week for not exceeding fifty-two weeks for a total disability for that period. Different amounts were to be paid in the event of the loss of hands or eyes, etc., or in case of permanent disability; and if death resulted from such an injury within ninety days from the date of the injury the company agreed to pay the beneficiary under the policy the sum of $5,000. There were special provisions regarding injuries received on railroad trains and other trains and a number of exemptions from liability. The exemptions material of consideration on this appeal are given hereafter. On Wednesday, June 3, 1903, Eugene Cary, the insured, accidentally fell while on his way to the bathroom in his house, and sustained an abrasion of the skin on his right leg, just above the ankle. The accident occurred in going down a flight of three steps in the hallway between his bedroom and the bathroom. Immediately after the accident his wife dressed the wound, which was a little bloody, with some white cloth. This dressing was renewed daily for a week, except on Sunday, and on one occasion she applied vaseline to it. On Friday she noticed that the wound had changed somewhat in its appearance. It had become red in color. On the second Wednesday, one week after the accident and two days before his death, a physician first saw the wound, and he found that Mr. Cary was suffering from blood poisoning. Two days later, which was nine days after the accident, Mr. Cary died. On July 2, 1903, plaintiff gave notice of the claim, alleging that Mr. Cary, in "descending the steps leading to the bathroom, slipped and fell, injuring his right leg. Inflammation set in, owing to infection of the wound, which resulted in his death on June 12,

1903." On August 15, 1903, a *post-mortem* examination was made by physicians representing both the plaintiff and the defendant, and subsequently parts of the body were microscopically examined. Upon the trial of the action all the medical experts agreed that Mr. Cary died from the disease of septicæmia or blood poisoning, resulting from the introduction of bacteria into his body through this wound. Plaintiff avers that death resulted solely and proximately from the accidental fall, which produced the abrasion of the skin on the leg of the deceased. Defendant denies that death so resulted, and asserts that death resulted from causes under which the policy exempts it from liability, and claims that death resulted either from poison or infection or something accidentally or otherwise taken or absorbed, or that death resulted directly or indirectly, wholly or in part, from causes or conditions of bodily infirmity or disease. The provisions of the policy under which these exemptions are claimed are as follows:

"(1) This insurance does not cover . . . any case of disability or death whatever, except where the claimant shall furnish to the company direct and positive proof that such disability or death resulted proximately and solely from accidental causes; (2) nor injury, fatal or nonfatal, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled; (3) nor death . . . nor disability resulting either directly or indirectly, wholly or in part, from any of the following acts, causes, or conditions: . . . Bodily infirmity or disease of any kind."

The cause was submitted to a jury, which by special verdict found the following facts:

"(1)Did Eugene Cary, by a fall in or near his bathroom, sustain an injury to his right leg on June 3, 1903, causing an abrasion of the skin on said leg? *Answer.* Yes. (2) If you answer the first question 'Yes,' then answer this question: Did the bacteria causing septicæmia, or blood poisoning, enter into the system of Eugene Cary through such abrasion of the skin? *A.* Yes. (3) Did Eugene Cary at the time of his

death have a varicose ulcer on the upper part of the lower third of his right leg? *A.* No. (4) If you answer the question 'Yes,' then answer this question: Did the bacteria causing septicæmia, or blood poisoning, enter into the system of Eugene Cary through such varicose ulcer? *A.* [No answer.] (5) Did the death of Eugene Cary result proximately and solely from bodily injury caused by external, violent, and accidental means? *A.* Yes. (6) Was there any such diseased condition of either the kidneys, the liver, or the veins of the right leg of Eugene Cary as contributed to cause his death? *A.* No. (7) Was the immediate cause of the death of Eugene Cary infection from bacteria, producing the septicæmia aforesaid? *A.* Yes. (8) If the court should be of the opinion that the plaintiff is entitled to recover, at what sum do you assess her damages? *A.* (by the court by consent of counsel) $11,269.64; one year and five months' interest, six per cent., $425.00—$11,694.64."

The court refused to direct a verdict for defendant and also denied a motion for a new trial. This is an appeal from a judgment entered in favor of plaintiff upon the special verdict.

For the appellant there was a brief by *Van Dyke & Van Dyke,* attorneys, and *J. H. Roemer,* of counsel, and oral argument by *Mr. W. D. Van Dyke* and *Mr. Roemer.*

For the respondent there was a brief by *J. G. Donnelly* and *Timlin & Glicksman,* and oral argument by *Mr. Donnelly* and *Mr. W. H. Timlin.*

SIEBECKER, J. The defendant insured Eugene Cary for the term prescribed in the policy "against the effects of bodily injury caused solely by external, violent, and accidental means," in the sums and upon the conditions specified, and among other things agreed that, "if death shall result from such injury within ninety (90) days from the date thereof, the said company will pay the sum of $5,000" to the beneficiaries designated in the policy. There is no controversy but that Mr. Cary sustained an injury to his right leg, which

caused an abrasion of the skin, that bacteria, causing septicæmia or blood poisoning, entered his system through such abrasion, and that his death resulted therefrom; but there is a wide divergence between the claims of the parties as to what was the proximate cause of Mr. Cary's death under the established facts in the case. One provision of the contract is: "This insurance does not cover . . . any case of disability or death whatever, except where the claimant shall furnish to the company direct and positive proof that such disability or death resulted proximately and solely from accidental causes." The jury found specifically that Mr. Cary's death resulted "proximately and solely from bodily injury caused solely by external, violent, and accidental means." This finding is assailed upon the ground that it is impeached by the undisputed facts established by the evidence and the findings in the special verdict. These findings are, in effect, that bacteria, causing septicæmia or blood poisoning, entered Mr. Cary's system through the abrasion of the skin caused by Mr. Cary's accidental fall, and that his death was immediately caused by the septicæmia produced from the infection by such bacteria. This contention involves the inquiry as to what is meant under the law of insurance by the proximate cause as applied and used by the parties to the contract. The term "proximate cause" as here employed must be understood to have been used by the parties to the contract in its common and accepted meaning, as adopted and approved in the law under like conditions and circumstances. While attempts to define it are numerous and the phraseology employed in these attempts differs in the use of terms, they all aim to express a certain and definite meaning, which has been observed and applied on many occasions in the decisions of this court. The proximate relation of cause and effect, establishing legal responsibility, implies that the result produced had its inception in some responsible agency. The difficulty lies in ascertaining the agency to which the result is legally attributable. As

stated by this court, the proximate cause "is not necessarily the immediate, near, or nearest cause, but the one that acts first, whether immediate to the injury, or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events, so united to each other by a close causal connection as to form a natural whole, reaching from the first or producing cause to the final result." *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 288, 72 N. W. 735. To determine it we must ascertain the cause which from its inception acts in a continuous sequence and produces the injury as a natural and probable result. It cannot be ascertained by any specific and direct test, but must be determined as any ultimate fact is inferred from evidentiary facts. If different agencies share in producing a result, it then becomes necessary to determine which is the responsible and efficient cause from which the injury proceeds, by tracing it to the active agency from whose inception the injury naturally follows, either directly or through other causes set in action by it. *Deisenrieter v. Kraus-Merkel M. Co., supra; Milwaukee & St. P. R. Co. v. Kellogg,* 94 U. S. 469; 3 Joyce, Ins. ch. 60; 1 Cyc. 273.

The facts upon which the jury based their finding of the special verdict that Mr. Cary's death resulted proximately and solely from bodily injury caused solely by external, violent, and accidental means are, in effect, that he accidentally fell and sustained an abrasion of the skin on his right leg, which wound appeared somewhat red and inflamed on the second day; that on the eighth day a physician first saw the wound and then found Mr. Cary to be suffering from blood poisoning; and that two days thereafter he died. The evidence also shows that the abrasion of the skin furnished the portal of entrance through which bacterial infection entered Mr. Cary's system and caused the septicæmia which was the immediate cause of his death. It is urged that unless the

evidence establishes the fact that the bacterial infection occurred at the time of the bodily injury by the fall, it cannot be found that his death was proximately and solely caused by the accident. As above stated, responsible causation, as applied in the law, is not dependent on time, distance, or a mere succession of events. If an injury is inflicted by an event, and it is found that it has set in motion all the succeeding agencies sharing in the result, then such event, as the efficient producing cause of the injury, is held to be the proximate cause of the injury. Under such circumstances the causal connection in the chain of events is shown by the dependence of each event for its action on the one preceding it, which thus form a continuous whole, with a proximate relationship established between the event which acted first through those naturally succeeding and the point of injury. Apply this test to the facts before us, and it is shown that no such bacterial infection would in all probability have occurred had there been no abrasion of the skin. This leads to the inevitable inference that the bacterial infection and the resultant septicæmia were in the natural course of events dependent upon and set in motion by the abrasion of the skin caused by the fall. The entry of bacteria into the system cannot be considered as an independent cause and as having intervened between the accidental fall and the death because of the fact that it was conditioned on the existence of the abrasion of the skin and was wholly incidental to and set in motion by it, thus making it one of the events in the chain of causation. We are satisfied that the jury were well warranted in their conclusion that Mr. Cary's death resulted proximately and solely from his accidental falling on the floor.

The policy exempted the defendant from any liability for any injury "resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled." Exemption from liability is claimed

under this provision, under the jury's finding that "the immediate cause of the death of Eugene Cary [was] infection from bacteria producing the septicæmia." This provision of the policy exempts defendant from liability in case Mr. Cary's death *was caused by* poison or infection. Nothing further need be said to refute the idea that bacterial infection proximately caused his death under the terms of the policy. This provision of the policy is an exemption from liability only where the resultant injury was proximately caused in the manner specified in the provision. We have shown that the infection which produced the septicæmia, which the jury found was the "immediate cause" of death, cannot be held to be its proximate cause, and therefore it does not come within the terms of this exemption. Since the verdict negatives any claim that death was produced by poison or from anything "accidentally or otherwise taken, administered, absorbed, or inhaled," we need not further consider this exception. In so far as there was a conflict in the evidence on this question it has been resolved in plaintiff's favor by the jury.

Another exemption agreed upon by the parties is that defendant should not be liable for death "resulting, either directly or indirectly, wholly or in part, from . . . bodily infirmity or disease of any kind." The facts as found exclude the idea that Mr. Cary was afflicted with any bodily infirmity or disease other than septicæmia induced by bacterial infection entering through the abrasion of the skin. The exemption manifestly cannot apply to this bodily infirmity or disease, the result of the accident; for, if it were treated as within the exemption, then it would be difficult to conceive of liability under any circumstances under insurance against effects of bodily injury caused solely by external, violent, and accidental means. In the very nature of things injury resulting from such an accident must be accompanied by some bodily infirmity in the general sense, and probably by disease in some form and degree, which in some measure contribute to

the resulting disability or death. The utterance of the court in the recent case of *White v. Standard L. & Acc. Ins. Co.* (Minn.) 103 N. W. 735, speaking on this subject, aptly states the rule applicable to this condition of the policy:

"If, however, the injury be the cause of the infirmity or disease—if the disease results and springs from the injury—the company is liable, though both co-operate in causing death. The distinction made in this particular is found in that class of cases where the infirmity or disease existed in the insured at the time of injury, and, on the other hand, that class of cases where the disease was caused and brought about by the injury. And even in cases where the insured is afflicted at the time of the accident with some bodily disease, if the accidental injury be of such a nature as to cause death solely and independently of the disease, liability exists."

The facts of this case justify the conclusion that Mr. Cary's death resulted from the injury he accidentally received, and defendant is liable within the intent and meaning of the provision of the policy. 1 Cyc. 261; *Hall v. American M. Acc. Asso.* 86 Wis. 518, 57 N. W. 366; *Freeman v. Mercantile Mut. Acc. Asso.* 156 Mass. 351, 30 N. E. 1013; *Manufacturers' Acc. Ind. Co. v. Dorgan,* 58 Fed. 945, 7 C. C. A. 581; *Western Comm. Trav. Asso. v. Smith,* 85 Fed. 401, 29 C. C. A. 223; *U. S. Mut. Acc. Asso. v. Barry,* 131 U. S. 100, 9 Sup. Ct. 755. The court properly awarded judgment on the special verdict.

By the Court.—Judgment affirmed.

HOFFMANN, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

January 9—January 30, 1906.

Limitation of actions: Statutes: Commencement of actions as to time: Same as to conditions precedent: Notice of injury, by whom given: Infants: Constitutional law.

1. The notice required by subd. 5, sec. 4222, Stats. 1898, is not a limitation upon the time for commencement of actions, but a condition or limitation upon the right to maintain actions unless such notice shall be served within one year after the happening of the event causing damage, or unless such notice shall become unnecessary by the actual bringing of the action within such year as provided by ch. 307, Laws of 1899.
2. Subd. 5, sec. 4222, Stats. 1898, contains no exception in favor of minors, and sec. 4233, while extending the time within which a minor may commence an action, plainly exempts minors from the operation of the statute limiting the *time* for commencement of actions only, and has no reference to the statute providing for the service of notice. Hence, where a minor failed for one year after an injury causing damage to either give the required notice or bring his action, an action subsequently brought cannot be maintained.
3. Under subd. 5, sec. 4222, Stats. 1898 (providing that the required notice shall be signed by the party damaged, his agent or attorney), it is sufficient if the notice show that it is given in behalf of the party who brings the suit, and, if in behalf of a minor, the notice may be given by his father, the natural guardian.
4. Subd. 5, sec. 4222, Stats. 1898, as to actions accruing after its passage, is not obnoxious to any constitutional provision.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This action was brought by a minor to recover damages for personal injuries sustained in September, 1901. The action was not commenced until more than one year had elapsed after the happening of the event which caused the injury. No

notice was served by plaintiff as required by subd. 5, sec. 4222, Stats. 1898, and this was pleaded in bar to the action by defendant. It was admitted on the trial that the action was not commenced until more than one year after the date of the injury and that no notice had been served. Defendant admitted in open court that it was guilty of negligence, which was the proximate cause of plaintiff's injury, and that plaintiff was not guilty of contributory negligence. It was further admitted that plaintiff was about nineteen years of age when the injury occurred and about twenty when the action was commenced. It was stipulated upon the trial that the plaintiff had proved damages in the sum of $1,000, and that they should be assessed at that sum if she recovered. The court ordered judgment for plaintiff, which was entered, and afterwards, on motion of defendant, vacated and set aside and judgment ordered for defendant. Plaintiff's motion for new trial was denied, and judgment entered in favor of defendant dismissing plaintiff's complaint with costs, from which this appeal was taken.

For the appellant there was a brief by *Fiebing & Killilea,* and oral argument by *W. F. Adams.*

Clarke M. Rosecrantz, for the respondent.

KERWIN, J. Two questions are presented for consideration upon this appeal: (1) Whether persons under twenty-one years of age are required to give the notice provided for in subd. 5, sec. 4222, Stats. 1898, as amended, within one year after the happening of the event causing the damage, in order to maintain an action commenced after the expiration of such year. (2) If subd. 5, sec. 4222, Stats. 1898, does require the giving of such notice, is it valid?

1. A brief reference to the statutes respecting limitation of time for the commencement of actions will show that the notice referred to in subd. 5, sec. 4222, Stats. 1898, is not a

limitation upon the time for commencement of actions, but a condition or limitation upon the right to maintain actions unless the notice shall be served within one year after the happening of the event causing the damage. Sec. 4206 (ch. 177) provides that civil actions can only be commenced within the periods of time prescribed, except when in special cases a different limitation is provided by statute. Sec. 4219 of the same chapter provides that the "following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued." Then follow, in this chapter: sec. 4220, providing a twenty-year limitation; sec. 4221, a ten-year limitation; sec. 4222, a six-year limitation; sec. 4223, a three-year limitation; sec. 4224, a two-year limitation, and sec. 4225, a one-year limitation. Sec. 4233 provides:

"If a person entitled to bring an action mentioned in this chapter, . . . be, at the time the cause of action accrued, . . . within the age of twenty-one years, . . . the time of such disability is not a part of the time limited for the commencement of the action."

Sec. 4249 of the same chapter in effect provides that the periods of limitation, unless otherwise specially prescribed by law, must be computed from the time of the "accruing of the right to relief by action." These several sections, from 4206 to 4249, inclusive, were passed before ch. 304, Laws of 1897, and relate exclusively to limitations upon the commencement of actions, while ch. 304, Laws of 1897, which was added to subd. 5, sec. 4222, as rewritten into the Statutes of 1898, is a separate and independent provision imposing a condition to be performed necessary to the maintenance of the action after the expiration of one year from the happening of the event causing the damage. *Malloy v. C. & N. W. R. Co.* 109 Wis. 29, 85 N. W. 130; *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301, 78 N. W. 412; *Troschansky v. Milwaukee E. R. & L.*

Co. 110 Wis. 570, 86 N. W. 156. Ch. 304, Laws of 1897, provides:

"No action to recover damages for an injury to the person shall be maintained unless, within one year after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made, and that satisfaction thereof is claimed of such person or corporation."

Ch. 307, Laws of 1899, dispenses with the above notice, when the action shall be brought and the complaint served within one year after the happening of the event causing the damage. Ch. 304, Laws of 1897, was in force when the plaintiff's cause of action accrued and imposed a condition, by its terms, upon all persons, without exception, to serve the notice provided for in order to maintain an action after the expiration of one year from the happening of the event causing the damage. No exception is made in favor of minors in this statute, and none can be ingrafted upon it by the courts. Statutes of limitation run against minors in the absence of exemption in their favor. Buswell, Limitations, § 104; Angell, Limitations, § 194.

It is urged, however, that this statute requiring the giving of notice within one year is a statute of limitation upon plaintiff's right of action, and within the protection of sec. 4233, and a very able and ingenious argument is presented in support of this contention. It is insisted that the law of 1897 in effect limits the plaintiff's right of action to one year and must, therefore, be regarded a statute of limitation. But a sufficient answer to this is that she would still have the statutory period within which to commence her action, provided she complied with the law of 1897. In *Troschansky v. Mil-*

waukee E. R. & L. Co., supra, in considering the question, this court said:

"The statute does not assume to limit the time in which the action is to be commenced. . . . The limitation is not upon the time of the commencement of the action, but upon the time within which a certain prescribed act, necessary to the enforcement of his cause of action, shall be done. If this is not performed within the time so limited, he loses his right to proceed."

The same reasoning applies to the argument of counsel that plaintiff is within the protection of the disability statute (sec. 4233). That statute plainly and unequivocally contains a saving clause in favor of persons under twenty-one years of age respecting the commencement of actions, and cannot by any legitimate construction be held to apply to the statute requiring the giving of notice.

Counsel strenuously urges that sec. 4233 should be so construed as to exempt minors during their disability from the operation of ch. 304, Laws of 1897. But we think this contention untenable. The disability statute plainly exempts minors from the operation of the statute limiting the time for commencement of actions only, and has no reference to the statute providing for the service of notice. Counsel has quoted from various decisions of this court to the effect that this law requiring notice is a statute of limitation, and in the sense used by this court in *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301, 78 N. W. 412, and other cases, it is a statute of limitation in that it imposes a condition upon the right to maintain the action, which must be performed within one year, but is in no sense a limitation upon the time for the commencement of actions, and it is very clear that the disability statute refers only to limitations upon the time for the commencement of actions. In *Malloy v. C. & N. W. R. Co.* 109 Wis. 29, 31, 85 N. W. 130, in considering this question the court said that "the requirement of notice simply set a new limit within which a certain step necessary to enforce

the right of action must be exercised." And again on page 32 (85 N. W. 131):

"Unquestionably, the legislative purpose was to require the injured party to inform the other within a reasonable time, fixed at one year, of his intention to hold him responsible. If he did so, then he might commence his action any time within six years. If he did not, then his right would be forfeited. The primary purpose seems to have been that notice should be given to afford the defendant an opportunity to investigate the circumstances before they got stale and to preserve evidence for his defense."

So the mischief to be avoided by the act required the service of notice by all, minors as well as adults, in order to accomplish the result, and it is not unreasonable to believe that the legislature had this in mind when the act was passed and concluded to make no exemption in favor of minors, but leave the protection of their rights to those charged with their care and maintenance. But it is not for us to speculate as to the purpose of the legislature. It is sufficient to say that minors are not exempted from the operation of the law, and we cannot disregard its plain language. Whether it would have been wise for the legislature to have exempted minors from the operation of the statute requiring notice to be given is a question for the legislature and not for the courts.

Many cases are cited by counsel for appellant on statutory construction, and especially the construction which statutes *in pari materia* should be given; but none of these cases violate the well settled rule, but on the contrary affirm it. We quote from *Mundt v. Sheboygan & F. R. R. Co.* 31 Wis. 451, 457:

"Courts cannot correct supposed errors, omissions, or defects in legislation. The office of interpretation is to bring out the sense where the words used are in some manner doubtful, and where these are plain and unambiguous the court cannot depart from the language of the statute. This court has too often of late had occasion to repeat and enforce these

rules, to permit them now to be called in question or disregarded. It is only where the intention of the legislature is ambiguously expressed, so as to be fairly capable of two or more meanings, that interpretation or any latitude of construction is allowable."

The statute in question is clear and unambiguous, and if its words be given their plain, obvious, and ordinary meaning there can be no room for doubt that the legislature intended the statute requiring notice to be served within one year after the happening of the event causing the damage should apply to all persons. To give it any other construction would be to disregard the plain meaning of the statute. Sutherland, Stat. Const. § 238; *Smith v. C., M. & St. P. R. Co.* 124 Wis. 120, 102 N. W. 336.

It is suggested by counsel for appellant that no provision is made by statute for the signature of the minor to the notice. The statute provides that the same shall be signed by the party damaged, his agent or attorney. It is sufficient if the notice shows that it is given on behalf of the party who brings the suit. *McKeague v. Green Bay,* 106 Wis. 577, 82 N. W. 708. The father, the natural guardian, may give such notice on behalf of the minor. *Reed v. Madison,* 83 Wis. 171, 53 N. W. 547.

2. It is further contended that if the statute requiring notice within one year applies to persons under twenty-one years of age, it is unconstitutional and void as repugnant to the first section of the fourteenth amendment to the constitution of the United States, and sec. 9 of art. I of the constitution of the state of Wisconsin. But it is sufficient to say, in reply to this contention, that the legislature has the right to impose conditions and pass limitation statutes running against minors as well as adults, and the question for consideration is whether a reasonable length of time be given after the right accrues within which to enforce it. It will be observed that in the case before us the plaintiff's right of action accrued

after the passage of the statute in question, while some of the cases cited by counsel for appellant are cases where the statute was passed after the right of action accrued, and it was held that the time was unreasonably short. In one of the cases cited it was held that forty-eight hours was an unreasonable time, while in another thirty days was held unreasonable. But we have not been cited to any case, nor have we found any, which holds that one year is unreasonable. It is not necessary to decide whether the plaintiff had a property right in future causes of action not in existence at the time of the passage of the statute in question, within the meaning of the fourteenth amendment of the federal constitution, nor to consider whether under the state constitution the remedy respecting future causes of action could be wholly cut off, because, assuming that it could not, we are satisfied that one year is a reasonable time within which to serve the notice in actions accruing after the passage of the act, and hence that the law is not obnoxious to any constitutional provision. *Smith v. Packard,* 12 Wis. 371; *Terry v. Anderson,* 95 U. S. 628; *Turner v. New York,* 168 U. S. 90, 18 Sup. Ct. 38. It follows that the judgment of the court below is right and must be affirmed.

By the Court.—Judgment affirmed.

CHICKERING-CHASE BROS. CO., Appellant, vs. WHITE and another, imp., Respondents.

January 10—January 30, 1906.

Foreign corporations: Right to transact business: Contracts: Statutes: Pleading: Evidence: Chattel mortgages: Renewal: Affidavit: Lien of boarding-house keeper: Essentials: Enforcement: Married women.

1. Under sec. 1770*b*, Stats. 1898 (providing that no foreign corporation, with certain exceptions, shall transact business or hold or dispose of property in this state until it shall have filed an au-

thenticated copy of its articles in the office of the secretary of state, and that every contract made by such corporation affecting its personal liability or relating to property within this state before complying with the provisions of the statute shall be void on its behalf), a contract made or a lien acquired upon property outside of the state by a corporation not transacting business within the state at the time is not void.

2. The failure of the foreign corporation to comply with such statute is defensive matter, and all the facts necessary to bring a case within the statute must be proven or the defense will fail.
3. Where a foreign corporation held a chattel mortgage on property in Wisconsin, dated before the corporation had complied with sec. 1770*b*, Stats. 1898, and the evidence failed to show that the mortgage was made in this state, and there was no proof that the corporation had ever transacted any business of any nature in Wisconsin prior to the time it filed its articles, a defense that at the time of the execution of the mortgage the corporation had not filed a copy of its articles with the secretary of state is untenable.
4. Under sec. 2315, Stats. 1898, providing for renewal of chattel mortgages by affidavit, when the affidavit is made by any person other than the mortgagee, the fact of the agency must be sworn to by the affiant; a mere recital of the agency is not a part of the affidavit and is insufficient.
5. In such case parol evidence of the fact cannot cure the defect.
6. A contract by a married woman to pay for her board while living with her husband and while she is engaged in no business creates no liability against the wife.
7. Under sec. 3344, Stats. 1898, giving every innkeeper and boarding-house keeper a lien upon and right to retain possession of the baggage and effects of any guest or boarder for the amount due him, in order that such lien may exist there must be a debt for board due from the boarder to the boarding-house keeper.
8. Where a married woman living with her husband came with the husband to a boarding house and engaged board, the indebtedness for the wife's board is the husband's debt, and hence no lien could attach to her separate property which she herself brought to the boarding house.
9. In such case, even if there had been an express pledge by the wife of her property for the payment of the debt, it would not create a boarding-house keeper's lien under sec. 3344, Stats. 1898, but at best an equitable lien or charge, enforceable by proper action in a court of equity or equitable counterclaim in an action at law.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, Circuit Judge. *Reversed.*

This is an action of replevin commenced August 13, 1904, by the plaintiff, a foreign corporation, to recover the possession of a piano detained by the defendants *L. J. White* and *M. J. White.* The plaintiff claimed title by virtue of a chattel mortgage upon the piano executed to it by the owner thereof, the defendant Mrs. Chas. T. Greene, on February 23, 1901, which mortgage was filed in the office of the city clerk of the city of Marinette March 10, 1901, and was claimed to have been renewed by an affidavit filed in the office of said clerk February 24, 1903. The defendants *White* were partners operating a boarding house in the city of Marinette, and claimed to retain the piano by virtue of a boarding-house keeper's lien thereon. Mrs. Chas. T. Greene was made party defendant but did not appear.

The action was tried by the court and findings of fact made in substance as follows:

(1) That the plaintiff, at the time of the execution of the mortgage, was and now is a foreign corporation.

(2) That the defendants *White* were, on the 9th day of April, 1903, and ever since have been, copartners engaged in keeping a hotel and boarding house in the city of Marinette.

(3) That the defendant Mrs. Chas. T. Greene was at the time of the execution of the chattel mortgage, and ever since has been, a married woman living with her husband.

(4) That at the time of the execution of the chattel mortgage Mrs. Greene was the owner of the piano in question.

(5) That she executed said chattel mortgage to secure payment of the sum of $325 to the plaintiff, and that a copy of the mortgage was filed in the office of the city clerk of Marinette March 10, 1901.

(6) That on the 24th day of February, 1903, there was filed in said city clerk's office and annexed to such copy of said mortgage an affidavit which, after the venue, reads as follows:

"Chas. A. Osgood, of and for the corporation of *Chickering-*

Chase Bros. Co., being duly sworn, says that they are the original mortgagees named in a certain chattel mortgage bearing date the 25th day of February, 1901, executed by Mrs. Chas. T. Greene, of Marinette, to *Chickering-Chase Bros. Co.,* and that said corporation has still an interest in said mortgage to the amount of $241.49, being part of the original amount secured thereby which is yet unpaid, and that they claim a lien upon the property named in said mortgage to that amount by virtue thereof.

"CHICKERING-CHASE BROS. CO.
"Chas. A. Osgood."

(7) That on March 4, 1902, the plaintiff filed in the office of the secretary of state of the state of Wisconsin a duly authenticated copy of its articles of incorporation, and that a license was then issued to the plaintiff to do business in this state, and that no copy of said articles had been theretofore filed in said office.

(8) That on April 9, 1903, the defendant Mrs. Greene became a boarder at the house of the defendants *White,* and remained so until July 2, 1903; that she returned as such boarder October 3, 1903, and remained until October 19, 1903; that she again returned as such boarder November 9, 1903, and remained until June 6, 1904.

(9) That the defendant Mrs. Greene agreed that she would pay for her board, furnished by the defendants *White,* at the rate of $6 per week while she was such boarder until March 28, 1904, and thereafter and until June 6, 1904, at the rate of $7 per week, and that she would charge her separate estate therewith.

(10) That on June 6, 1904, there became due to the defendants *White* from the said Mrs. Greene, on account of such board, $278.90, no part of which has been paid.

(11) That on or about April 9, 1903, Mrs. Greene, as such boarder, brought to the boarding house of the defendants *White* the piano in controversy, and that the same remained in said house and in possession of Mrs. Greene until June 6, 1904, and that thereafter and up to the present time said piano has remained in the defendants' said boarding house and in their possession.

(12) That on or about August 13, 1904, the plaintiff de-

manded possession of said piano from the defendants *White,* which demand was refused.

(13) That there is due from the defendant Mrs. Greene to the plaintiff, on account of the demand secured by said chattel mortgage, the sum of $267.88.

(14) That the value of said piano is $200.

As conclusions of law the court found:

(1) That the defendants *White* were and are creditors of the defendant Mrs. Greene in the sum of $278.90, for which her separate estate was and is chargeable.

(2) That the affidavit of renewal is insufficient in law, and that the lien of the plaintiff's chattel mortgage ceased as against the defendants *White* before April 9, 1903.

(3) That during the time in which said Mrs. Greene remained in the house of the defendants *White* the relation of boarder and boarding-house keeper existed between her and the said defendants *White.*

(4) That as against the said defendant Mrs. Greene the defendants *White* had continuously and now have as boarding-house keepers a lien upon and the right to retain possession of said piano for the amount due them from the said Mrs. Greene, to wit, $278.90, and that as against the plaintiff the said lien was and is superior to any lien or title which the plaintiff had or has by virtue of said chattel mortgage.

(5) That the defendants *White,* at the time of the demand aforesaid, were and still are the owners of a special interest or property in said piano to the amount of $278.90.

(6) That subject to such special interest of the defendants *White* the plaintiff has a special interest in said piano to the amount of $267.88.

(7) That by virtue of their special interest aforesaid the defendants *White* were at the time of said demand and still are entitled to the possession of the said piano.

(8) That the defendants *White* are entitled to judgment of dismissal of the complaint, with costs.

Plaintiff filed the following exceptions to the findings of fact:

"First. That the plaintiff excepts to the findings of fact in that the court does not find therein that Chas. A. Osgood,

affiant in the affidavit of renewal, mentioned in finding 6, then was general manager of the plaintiff.

"Second. The plaintiff excepts to said findings of fact because the court did not find therein that Mr. and Mrs. Chas. T. Greene both went to board with the defendants *L. J. White* and *M. J. White,* under an agreement between said defendants and the said Mr. Greene."

"Third. The plaintiff excepts to the ninth finding of fact and to the whole thereof."

Judgment was entered upon the findings dismissing the complaint, and the plaintiff appeals.

For the appellant the cause was submitted on the brief of *W. B. Quinlan,* attorney, and *Henry T. Scudder,* of counsel.

For the respondent there was a brief by *Hutchinson & Goldman,* and oral argument by *H. R. Goldman.*

WINSLOW, J. This is a contest for the possession of a piano between a chattel mortgagee upon the one side and a firm claiming a subsequent boarding-house keeper's lien upon the other side. The trial court held that the boarding-house keeper's lien was paramount, and the chattel mortgagee seeks to reverse the judgment upon this appeal. In the trial court the validity of the alleged chattel mortgage was attacked on two grounds: (1) because the plaintiff was a foreign corporation and had not at the time of the execution of the mortgage filed with the secretary of state a copy of its articles of incorporation; (2) because the affidavit of renewal was insufficient upon its face.

As to the first of these contentions we are entirely satisfied that it is untenable. Sec. 1770*b,* Stats. 1898, provides that no foreign corporation (with certain exceptions) shall transact business, hold or dispose of property in this state until it shall have filed an authenticated copy of its articles in the office of the secretary of state, and that every contract made by such corporation affecting its personal liability or relating to property within this state before complying with the pro-

visions of the statute shall be void on its behalf and on behalf of its assigns. The mortgage in question was admittedly made before the section had been complied with, but the difficulty is that it does not appear that the mortgage was made within this state. For all that appears on its face or in the evidence it may have been executed in Chicago, and there is no proof that the plaintiff has ever transacted any business of any nature in this state prior to the time when it filed its articles. The section does not render void a contract made or a lien acquired upon property outside of the state by a corporation not transacting business within the state at that time. As this is strictly defensive matter, all the facts necessary to bring the case within the statute must be proven or the defense will fail.

As to the second contention made by the defendants, the trial court correctly held that the affidavit of renewal was insufficient. Sec. 2315, Stats. 1898, provides that a chattel mortgage shall cease to be valid as against the creditors of the mortgagor or subsequent purchasers or mortgagees in good faith after the expiration of two years from its filing, unless within thirty days prior to the expiration of the two years the mortgagee, his agent or attorney, "shall make and file an affidavit setting forth the mortgagee's interest in the property." The affidavit in the present case was made by one Osgood, who is therein described as "of and for the corporation of *Chickering-Chase Bros. Co.,*" but the affiant nowhere in the affidavit states under oath that he is the agent or attorney of the corporation. This is fatal. The fact of the agency must be sworn to by the affiant; a mere recital is not a part of the affidavit and is insufficient. *Hill v. Hoover,* 5 Wis. 354; *Miller v. C., M. & St. P. R. Co.* 58 Wis. 310, 17 N. W. 130, and cases cited. Nor could parol evidence of the fact cure the defect. *Iverslie v. Spaulding,* 32 Wis. 394. But, notwithstanding the insufficiency of the affidavit of renewal, the mortgage remained valid as between the parties and as against

all persons save creditors of the mortgagor and subsequent purchasers or mortgagees in good faith, and the question whether the defendants *White* had a valid lien as boarding-house keepers upon the property superior to the plaintiff's lien is yet to be determined.

Our statute provides that every innkeeper and boarding-house keeper shall have a lien upon and retain possession of the baggage and effects of *any guest or boarder* for the amount which may be *due him* for board *from such guest or boarder* until such amount is paid. See. 3344, Stats. 1898. The court found that there was such a lien in this case which was superior to the plaintiff's right, if any, and hence dismissed the bill. The findings of fact on which the conclusion was based were, in brief: That Mrs. Greene was a married woman living with her husband and owned the piano in dispute; that on April 9, 1903, she became a boarder at the *White* boarding house, and remained such boarder with intervals of absence until June 6, 1904, and agreed that she would pay for her board $6 per week up to March 28, 1904, and thereafter $7 per week, and charge her separate estate therewith (there being no finding that she had any separate estate or property other than the piano, nor any separate business); that on the 6th of June, 1904, there was due from her to the defendants *White* for such board $278.90, which has not been paid; that she brought the piano to the boarding house on April 9, 1903, and that it remained there continuously up to the present time. Exception was duly taken to the findings because the court did not find that Mr. and Mrs. Greene both went to board with the defendants under an agreement between the defendants and Mr. Greene, and exception was also taken to the ninth finding, by which it was found that Mrs. Greene contracted to pay for her own board and agreed that she would charge her separate estate therewith. If these findings are to be construed as meaning that Mrs. Greene, at or near the time when she commenced to board with the defendants,

made any agreement to pay the *Whites* therefor or that she would charge her separate estate with her board, they are absolutely unsupported by a shred of evidence. On the contrary, the undisputed evidence, given by the defendant *L. J. White,* is that Mr. and Mrs. Greene came to the house together; that he had an agreement with *them* when they first came to charge them $12 per week; that the charges upon the books were made against "Charles T. Greene and wife;" that he frequently asked Mr. Greene for payments, and Mr. Greene made numerous promises to pay, and finally gave an order on a third person which was not paid; that he never spoke to Mrs. Greene about the matter until some time in March, 1904, when he told her he could not keep them any longer unless the bill was paid, at which she was surprised, and said that if he would let them stay she had some money of her own and would pay him every cent out of her own money, to which he replied that if she would pay the bill he would let the matter rest; that he had talks with both Mr. and Mrs. Greene about the bill, and they both told him "There was no need to worry, there is plenty of stuff here to secure you, the library, piano, and pianola," but they never said he could hold the piano or anything else if they did not pay, though he expected to do so. Mrs. Greene was not sworn upon the trial and the foregoing facts were testified to by *Mr. L. J. White,* the managing partner of defendants' firm, and are absolutely uncontradicted and must be considered as the exact facts of the case upon the points which they cover. The answer set up simply a boarding-house keeper's lien resulting from the alleged fact that Mrs. Greene came to the boarding house with the piano April 9, 1903, and engaged board and remained there as a boarder for the periods named in the findings, and became indebted therefor in the sum of $278.90. Nothing is said in the answer about any agreement to charge her separate property with her board. It seems apparent that the findings must have been drawn by the defendants' attor-

neys to meet the supposed exigencies of the case, and it hardly seems that they could have been examined by the trial judge with his usual care before signing. Attention is called to the remarks upon this subject contained in the case of *E. M. Fish Co. v. Young, post,* p. 149, 106 N. W. 795.

Considering the case upon the actual state of facts proven rather than upon the findings, there are several questions presented. The sole defense pleaded was that the defendants were entitled to hold the piano by virtue of a boarding-house keeper's lien thereon, and this was the defense found and adjudged by the court. In order that such a lien may exist under the statute (sec. 3344, *supra*), there must be a debt for board due from the boarder to the boarding-house keeper, and the initial question is whether the evidence here showed any debt at law due from Mrs. Greene to the defendants. Mrs. Greene was a married woman living with her husband, and when she and her husband came to the boarding house together and engaged board it is very plain that the contract thereby made was her husband's contract, and the debt incurred under it was her husband's debt and not hers. She could bind herself at law for no debts except debts necessary or convenient to the beneficial enjoyment of her separate property or the carrying out of her separate business or in relation to her personal services. *Stack v. Padden,* 111 Wis. 42, 86 N. W. 568. A contract to pay for her board while living with her husband and engaged in no business is not included within the exception. This principle applies as well to the supposed arrangement made with the wife alone in March, 1904, as to the original contract alleged to have been made with both husband and wife in April, 1903. The indebtedness for the wife's board was at all times, therefore, the husband's debt and not the wife's, hence the lien could not attach to her separate property which she herself brought to the boarding house, because there was nothing due to the boarding-house keeper *from her* for board, and such property is not liable for her husband's debts.

But it is further argued that she might legally charge her separate property with a lien to secure payment of the board bill, and that she did so in the present instance. There are at least two sufficient answers to this contention: (1) *Mr. White* admits that she never pledged the piano for her board or said that it might be held until the board was paid; (2) even should it be held that such a pledge was made and the property thus charged in equity with the payment of the debt, a boarding-house keeper's lien under the statute would not thereby be created, but at best an equitable lien or charge which would necessarily have to be declared and enforced by proper action in a court of equity, or at least by an equitable counterclaim in this action, and no such action has been brought or counterclaim made.

The conclusions reached necessarily call for reversal of the judgment.

By the Court.—Judgment reversed, and action remanded with directions to render the proper judgment in replevin for the plaintiff.

SPIRITUAL AND PHILOSOPHICAL TEMPLE, Respondent, vs. VINCENT and others, Appellants.

January 10—January 30, 1906.

Voluntary associations: Rights of members: Control of property: Religious societies: Incorporation: Name: Notice: "Stated meeting."

1. Every participant in a voluntary organization has the absolute right to have its property controlled and administered according to its organic plan and to participate in its affairs in harmony therewith.
2. A statute enabling a voluntary association to be converted into a corporate entity, and existing when the voluntary association was formed, is incorporated into the association agreement by necessary implication, and every member of such association is conclusively presumed to have impliedly agreed, in joining the association, that it might at any future time be converted into

a corporate organization according to the statutes regulating the matter.

3. Where a voluntary association is converted into a corporate entity it is not material that the name chosen for the corporation is precisely the one by which the association was known, so long as the corporation is formed for substantially the same purposes as those of the voluntary association.

4. If, in changing to a corporation, the steps taken by a voluntary association leading up to the recording of the certificate of organization are in conformity with law and the certificate valid, the corporation thereby *eo instanti* comes into existence with its status as regards the property and other rights of the association and membership in the corporation absolutely fixed, and an immediate and complete substitution of the corporate entity for the association follows.

5. In such case the substitution of the corporation and memberships therein for the former association and its memberships is complete, regardless of whether a majority or minority of members of the association participated in bringing about the change, all being free to participate if they so desired.

6. In such case any act done thereafter by persons in control of the corporate affairs in violation of any membership right does not affect the corporate existence or functions. It is a mere private wrong redressible by the appropriate remedy.

7. In an action to determine the right of possession and enjoyment of property formerly possessed by a voluntary association which had been converted into a corporate entity by the action of a minority of its members, the evidence, stated in the opinion, is *held* to sustain findings negativing all charges of fraud on the part of the minority.

8. Under sec. 1990, Stats. 1898 (providing that not less than three members of any church or society of any religious sect or denomination which shall have been organized in this state, and which at the time maintains regular public worship, may, after due public notice given at some stated meeting, organize a corporation for religious and other specified purposes), a meeting held on the usual day of worship, at the regular home of the society, whether attended by a majority or minority of the members, is a "stated meeting" in the statutory sense.

9. In such case the regular meeting of the association, according to the custom before and after a factional disturbance, is not rendered irregular by the mere circumstance that a part of the members, large or small, saw fit to assemble at some other place. As between the two, the latter was the irregular and the former the regular meeting.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Equitable action to restrain defendants from interfering with the possession and enjoyment by plaintiff of property formerly possessed by a voluntary organization, sometimes known as "The Spiritual and Philosophical Congregation" and sometimes as the "Spiritual and Philosophical Temple," involving the question of whether the right to such property is in the plaintiff. The issues raised by the pleaded and pleadable facts material to the rights of the parties as determined by the court upon a trial duly had are sufficiently indicated by the following abstract of the findings:

In 1882 some residents of the city of Green Bay, Wisconsin, organized a religious association as "The Spiritual and Philosophical Congregation of Green Bay." It purchased lot No. 691, according to Navarino's plat of said city, for the purpose of erecting thereon a church building. The expenses thus incurred and for such church building and other expenses of the association were borne by its members. The lot was conveyed to three members as trustees. Until 1900 one Everarts generally served the association as pastor, Mrs. Zwara serving when Everarts was unable to do so. She took his place in the spring of 1901 and continued thereafter to serve until the fall of that year when, because of her illness, one Dewaarzegger succeeded her. Subsequently she recovered and resumed her former place against the wishes, however, of a majority of the members, but in harmony with the officers of the association, except two trustees. Such majority adhered to Dewaarzegger and attended services under him at the residence of his sister in Green Bay. The division was solely over the question as to which of the two persons named should do the preaching. Such officers consisted of a president, vice-president, secretary, treasurer, and three trustees. Except as aforesaid, the church building continued to be the sole meeting place of the members of the association up to the

attempted organization of a corporation, as hereinafter stated, services being held there regularly on Sunday under Mrs. Zwara as preacher. It was the custom of the society after Sunday morning services to have read or given out business notices appertaining to the association affairs. For some time prior to the organization of the corporation such notices were read or given out in the English language, substantially all members of the congregation being sufficiently familiar therewith to understand the same, though in the beginning and for a time thereafter such notices were read or given out in the French language. Sunday, March 1, 1903, at the customary time, the secretary read a notice signed by five members to the effect that March 7th thereafter at 8 o'clock p. m. at the church building there would be a meeting to consider the question of incorporating the association under the laws of the state of Wisconsin. The members present did not do anything to deter any other member from attending on the date the notice was read, nor did they design to give out the notice when none of the dissenting members were present. One of the dissenters was present when the notice was read, and by assistance was enabled to partially apprehend its purport. He understood that a meeting was to be held, according to the notice, to take action in relation to the church property, and so informed some of his associates. About the time the notice was given out the majority members were assembled at the home of Dewaarzegger's sister. No notice of the meeting to consider the question of a corporate organization was given, except as aforesaid, nor did the majority members obtain information thereof. Had such opposing members been present when the notice was read, as they might have been, they would have understood it. At such time and place arrangements were made for the regular election of officers, to take place April 16th following. All officers and trustees but the two belonging to the majority were present. On the day appointed for considering the subject of a corporate organization a meet-

ing was held to that end, none of the majority members being present or knowing of the occurrence, except the one who heard the notice read. March 14, 1903, a certificate of organization in due form for a corporation to succeed the association as the "Spiritual and Philosophical Temple" was duly filed and recorded in the office of the register of deeds of Brown county, Wisconsin, the same being the result of the meeting aforesaid. On the day when it was concluded to incorporate the society, notice was given out of a meeting at the church building March 22, 1903, at 2 o'clock p. m., to adopt a constitution and by-laws of the corporation. A meeting was held accordingly. August 9th thereafter, trustees of the corporation were duly elected and qualified and the church property was in due form turned over to the new organization. The fact of the organization of the corporation became known to the majority members immediately after its occurrence. After such organization all persons previously belonging to the association and in good standing were regarded and treated as members of the new organization. Some of them attended services from time to time at the church and paid their regular dues into the corporate treasury. The annual election of officers of the old organization was customarily held, according to its by-laws, April 26th, in case of that date falling on Sunday, otherwise on the Sunday nearest that date. The majority members, deeming the attempt to organize a corporation invalid, called a meeting for April 26, 1903, to elect trustees of the association as usual. A meeting was accordingly held and a full number of trustees, in form, elected, who thereafter pretended to represent the association in business matters. August 9th thereafter, defendants, claiming that the old organization still existed, took possession of the church building, excluded the plaintiff and its officers therefrom, and thereafter continued to exclude them until required by the mandatory injunction of the court in this action to restore the former situation.

Upon such facts the court decided that the notice given as indicated satisfied the statutory requisites on the subject; that the corporation was accordingly, in due form, created; that it was legal and succeeded to the property and rights of the old organization; and that all members of such organization thereby became members of such corporation, and that plaintiff was entitled to judgment accordingly, enjoining and restraining defendants from interfering with the plaintiff, as regards keeping and enjoying the property formerly possessed by the "Spiritual and Philosophical Congregation." Judgment was according rendered, from which this appeal was taken.

For the appellant there was a brief by *Wigman, Martin & Martin,* and oral argument by *J. M. H. Wigman* and *P. H. Martin.*

For the respondent there was a brief by *Joseph Chopin* and *Kittell & Burke,* and oral argument by *John A. Kittell.*

MARSHALL, J. It may be conceded that were it not for the fact that, when the voluntary organization was created, the law existed substantially as now, enabling such a society to be converted into a corporate entity, and as a necessary result the ownership and right of possession of what was formerly vested in such society changed to the new creation and memberships in the latter substituted for those in the former, it would not have been competent for the minority, or even a majority, of the members of such organization, with or without a law enacted subsequently to the formation of the society and without the consent of the rest of the members, to take its property and make the substitution indicated as to membership rights. Every participant in a voluntary organization has the absolute right, which the courts will protect, to have its property controlled and administered according to its organic plan and to participate in its affairs in harmony therewith. *Schiller Commandery v. Jaennichen,* 116 Mich. 129,

74 N. W. 458, and analogous authorities cited to our attention are recognized as good law, but we need not discuss them because they are wholly inappropriate to the situation before us.

As indicated, the law under which respondent justifies was in existence when the voluntary organization in question was formed. That law, therefore, must be regarded as having been incorporated into the association agreement by necessary implication. Every member must be conclusively presumed to have, impliedly, agreed, in joining the society, that it might at any future time be converted into a corporate organization according to the statutes regulating the matter.

Whether the name chosen for the corporation was precisely the one by which the society was known is not material. The law contemplates that the corporation shall be formed for the same purposes, substantially, as those of the voluntary organization, but that such name may be agreed upon as the parties controlling the matter see fit to select, and which is reasonably appropriate for the purpose.

Neither is it material whether the administration of the corporation, after its creation, was regular, or whether the by-laws adopted were reasonable or unreasonable. If the steps leading up to the recording of the certificate of organization were in conformity with law the corporation thereby *eo instanti* came into existence with its status as regards the property and other rights of the society and memberships in the latter absolutely fixed. The law plainly contemplates, in such a case, the immediate and complete substitution of the corporate entity for the association. Any act done thereafter by persons in control of the corporate affairs in violation of any such membership right does not affect the corporate existence or functions. It is a mere private wrong redressible by the appropriate remedy.

Sec. 1991, Stats. 1898, provides that the "society shall be known and incorporated by the name" determined upon, as evidenced by the certificate of organization, and such certifi-

cate shall be recorded in the office of the register of deeds, and "when . . . so recorded the society named therein shall be a corporation and shall possess all the powers and privileges granted to corporations by chapter 85," etc. So in this case the substitution of the corporation for the former association and memberships in the former for those in the latter, regardless of whether a majority or minority of members of the association participated in bringing about the change, all being free to participate if they so desired, was complete, as indicated in *West Koshkonong Cong. v. Ottesen,* 80 Wis. 62, 49 N. W. 24, when the certificate of organization was recorded, if such certificate was valid.

Some question is raised as to whether the members of the association, who caused the corporation to be formed, proceeded fraudulently, as regards the nonparticipants. The trial court did not think so, and we see no good reason to disturb the decision in that regard. It may be that the conduct of the members of the minority party was not characterized by that fairness which should distinguish any community of individuals, especially those of one existing for religious purposes, but we have little or nothing to do with the mere ethical features of the case. The findings of the court negative, most distinctly, all charges of fraud on the part of the minority, and they seem to be fairly supported by the evidence. The meeting at which the notice was given of the time and place when the subject of converting the society into a corporate organization would be considered was free to all members, and the meeting appointed was likewise free. The notice was read when and where all members would be expected to be present if they particularly cared to take careful note of the purposes of those who regularly attended service held at the home of the society. It was given out according to custom, both as to order and manner. It was read at the close of the regular Sunday service and in the English language. There was no design to give it out when members of the majority

party were absent, nor was there any active effort to prevent members of the majority from being present on the day appointed in the notice. The one member of the majority who was present when the notice was read, had full opportunity to understand it, and was aided in that regard by members of the minority.

The matters to which we have referred aside, it seems to be conceded that, if the meeting at which the notice was given was a stated meeting within the meaning of the statute, what followed resulted in the creation of a corporation in form and in fact with all the consequences we have indicated. Was it a stated meeting? That is the vital point.

The language of the statute on the point last suggested to be examined in answering the above stated question is as follows:

"The members, over twenty-one years of age, not less than three in number, of any church or society of any religious sect or denomination which shall have been organized in this state and which, at the time, maintains regular public worship may, after due public notice given at some stated meeting of such church, . . . organize a corporation for religious, charitable or educational purposes in the manner hereinafter provided." Sec. 1990, Stats. 1898.

The findings respond in detail to all the calls thereof. We are unable to appreciate the criticism of counsel upon the trial court's decision on this point. They urge that the meeting of the majority was a stated meeting as well as that of the minority, though it was not held at the society's church. That might safely be conceded without aiding appellant in the least, since the statute makes no requirement for notice to be given at two stated meetings in the event of the society by reason of a factional disturbance holding meetings in two regular places. In such circumstance it seems clear that the meeting held at the regular home of the society, whether attended and supported by a majority or minority of the members, is a stated meeting in the statutory sense. In this case

the regular meetings of the society, according to the custom before and after the factional disturbance, were not rendered irregular by the mere circumstance that a part of the members, large or small, saw fit to assemble at some other place. As between the two, the latter was the irregular and the former the regular meeting.

Much stress is laid by counsel on the fact that in several instances of factional disputes in church societies, and the incorporation of the society on the initiative of one of the factions, the notice was given at a customary meeting held at the regular home of the society and at the one held at the place of worship of the members of the opposing faction as well, as in *West Koshkonong Cong. v. Ottesen,* 80 Wis. 62, 49 N. W. 24. We are unable to see any significance in that, since the statute makes no requirement for such double giving of the notice. No authority is referred to holding that such double notice is essential. Doubtless the legislative idea is that it shall be given in such a way as to furnish facilities to all concerned to receive information of the meeting to take action under the statute. That specifies distinctly the method of procedure. It was followed in this case, as it seems, in letter and spirit. Hence the agreement to incorporate and the preparation and execution of the certificate of organization and the due recording of the same dissolved the society and substituted in its place the corporate entity, as the trial court held. *West Koshkonong Cong. v. Ottesen, supra; Trustees v. Bly,* 73 N. Y. 323; *Holm v. Holm,* 81 Wis. 374, 51 N. W. 579. It should be noted that while there was a double giving out of the notice in *West Koshkonong Cong. v. Ottesen, supra,*—there being a factional division as in this case,—one faction holding its meetings at the church and the other at a neighboring schoolhouse, the case turned on the notice given at the customary meeting held in the church, no particular significance, seemingly, being given to the reading of the notice at the schoolhouse meeting.

By the Court.—The judgment is affirmed.

KRUEGER, Appellant, vs. KRUEGER, Administrator, Respondent.

January 10—January 30, 1906.

Wills: Probate: Contest: Mental competency: Appeal: Findings, when disturbed.

Where the only questions argued in the supreme court are the mental competency of the testator and the legality of execution of a will, and there is no clear preponderance of evidence against the findings thereon made by the trial court, the judgment will be affirmed.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Mary S. Krueger, a widow, having five children, and possessing about $3,500 worth of property, all personal, on March 15, 1904, the day before her death, executed a will, as follows:

"First. I give and bequeath to my son *Albert W. Krueger* three hundred dollars.

"Second. *Christian* and Mary and Frederick and Annie to receive the balance of the money and mortgages belonging to me in equal shares.

"Third. My horse and buggy, cutter, and cow, and harness, and all my household furniture and piano and pictures, I give to my daughter Annie J. W. Krueger."

This will was drawn by a neighboring justice of the peace, D. E. Whiting, and claimed to have been signed by testatrix in presence of himself and Mary L. Whiting, who subscribed as witnesses. The will was contested by *Albert W. Krueger* on three grounds: (1) Want of testamentary capacity; (2) indefiniteness and uncertainty; and (3) absence of statutory execution. There was evidence offered and contradicted as to existence and degree of diabetic coma and of diabetic blindness and as to the subscription by the two witnesses mentioned in the presence of the testatrix, and by D. E. Whiting in the presence of Mary L. Whiting; also, generally, as to the mental condition and capacity of the testatrix at and

about the moment of execution. The court filed a careful opinion analyzing the evidence on these various subjects and made finding that testatrix was competent, that by the surrounding facts proved the will was definite and certain, and that it was executed in all respects as required by law. Whereupon the judgment of the county court admitting said will to probate was affirmed, with costs against the contestant, from which judgment said contestant appeals to this court.

The cause was submitted for the appellant on the brief of *Francis X. Morrow,* attorney, and *Sheridan & Evans,* of counsel, and for the respondent on that of *Classon & Classon.*

DODGE, J. The only questions argued in this court are mental competency and the legality of execution. These are pure questions of fact, and we find no clear preponderance of evidence against the findings thereon made by the trial court. Indeed, not enough to so reasonably justify appellant in expectation of a favorable result upon the appeal that we should order his costs paid out of the estate. Such being the case, we cannot overturn those findings, which fully support the judgment.

By the Court.—Judgment affirmed.

VAN DE BOGART, Respondent, vs. MARINETTE & MENOMINEE PAPER COMPANY, Appellant.

January 11—January 30, 1906.

Master and servant: Negligence: Injuries to servant: Assumption of risk: Contributory negligence: Infants: Obvious danger: Proximate cause: Special verdict: Instructions to jury: Prejudicial error.

1. Plaintiff, a girl fifteen years old, was injured by the catching of her hair on a set-screw which held a collar on a shaft revolving so rapidly that the set-screw could not be seen. When injured

she was in the proper place for the performance of her duty, had little general knowledge of machinery, did not understand the relation of one part to the other, and did not know that the set-screws were used on the shaft, which with its attachments she had only seen in operation. *Held*, that plaintiff did not assume the risk of the negligence causing the injury.

2. In such case warning of danger of injury to her fingers from knives held onto the shaft through such set-screws is insufficient to apprise plaintiff of the danger of coming in contact with the set-screws.

3. The rule that knowledge of all obvious dangers is imputed to an adult servant and he assumes all risks incident to them applies to minors in so far as their age, intelligence, discretion, and judgment enable them to comprehend and appreciate such dangers.

4. In an action for personal injuries to a fifteen-year-old girl from machinery, in the absence of showing that she in fact knew of the danger which caused the injuries and in view of her age, intelligence, experience, discretion, and judgment, as shown by the evidence, stated in the opinion, it cannot be said, as matter of law, that she ought to have discovered and understood such danger.

5. A special verdict finding defendant negligent in using a set-screw on a machine at the place and manner it did, and that it thereby rendered plaintiff's working place unsafe; that plaintiff's hair caught in this set-screw while she was in the performance of her duty, and that it thereby caused her injury; and that persons of ordinary intelligence and prudence should reasonably have anticipated that the presence of the set-screw would cause some injury to employees working about the machine, sufficiently covers all the essential elements of proximate cause.

6. General instructions given to the jury, stated in the opinion, are *held* to have transgressed the rule requiring that instructions be confined to an explanation of the questions of the special verdict, without informing the jury of the legal effect of their answers to the questions.

7. Where instructions given were not erroneous, and no written requests for further instructions were made, no valid exception can be urged on the ground that abstract propositions were given on questions submitted to the jury without adequately covering the issues by the instructions applicable to the facts.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, Circuit Judge. *Reversed.*

This is an action to recover damages which plaintiff claims

she sustained while in defendant's employ through defendant's negligence. The defendant is an incorporated company and owned and operated a paper mill at Marinette at the time the injury is alleged to have been done. The plaintiff was employed by the defendant in June, 1903, and was injured on August 24th following. She was fifteen years of age and had actually worked as a cutter girl at one of defendant's paper machines for four weeks before the day of the accident. The operating parts of this machine were held and supported by a frame, on which rested numerous rolls for carrying paper and shafts for the attachment of circular slitters or knives for cutting paper into different sizes. The slitters were movable upon the shafts, and permitted of adjustment on it for cutting sheets of paper of different sizes. They had collars at the point of attachment to the shafts, and the slitters were firmly held in place on the shaft by means of set-screws through the collars. Plaintiff's duties consisted in working at and about this machine, either in laying off sheets of paper as they came from the machine, or in removing the paper shavings cut by the slitter next to the edge of the paper so as to prevent them from clogging the machine and winding around the shafts and the knives. When engaged in removing the shavings her place of work was below the top rolls and slitters of the machine. The slitter shaft under which she performed this duty was about four and one-half feet above the floor on which she stood. In performing this duty it was necessary for her to incline her body somewhat and to reach up with her hands to pull down the shavings. When the slitters were in motion they revolved with such rapidity as to prevent one from seeing the set-screws, which projected from three-fourths to one and one-fourth inches out of the collars. Plaintiff was not required to be under this part of the machine when it was not in operation and motion, and she had not observed or seen the slitters and set-screws when the machine was not in operation. She did not understand the different parts of the

machine or the relationship of one to the other, nor did she observe them aside from what came to her notice generally in performing her particular duties while the machine was running. She understood the nature of her duties and that there was danger in working about machinery. She had been instructed that in removing the paper shavings there was danger of getting her fingers cut by the slitters, but aside from this she knew little about the machine, and she testified that she did not know what a set-screw was. The first three weeks of her employment she was engaged in receiving and piling up sheets of paper, and during the week before the accident she worked "on rolls," attending to the removal of the paper shavings. While so engaged "on rolls" she would be under the machine while actually removing shavings. At other times she stood away from the machine in a position from which she could observe the shavings. On the day of the accident she assumed her duties, working "on rolls." After having removed shavings in the usual manner and while standing beside the machine talking with others, she observed that the shavings failed to leave the slitter as they should and she went under the machine to attend to them. She stood under the machine in a stooping position, looking up at the shavings and working with her hands to remove them from the end slitter, and while thus engaged her hair caught in the revolving part of the machine immediately above her, drew her against the slitter shaft and inflicted severe injuries. It appears that there was a depressed fracture back of the temple about an inch in diameter, the bone having been driven into the brain. No new bone has formed, but the wound is healed over and covered with cicatrized tissue. There is testimony tending to show that she suffers much pain, and that since the injury she has fainting spells and is afflicted with sickness which she did not have before the injury. The case was submitted to a jury which rendered a special verdict, finding in effect: (1) The plaintiff was injured by having her hair caught on a set-screw

attached to a revolving slitter and shaft. (2) That her working place was not reasonably safe on account of the presence of the revolving screw. (3) The defendant was guilty of negligence in permitting the set-screw to be placed and used as it was. (4) That a person of ordinary intelligence and prudence should reasonably have anticipated that the set-screw as used and applied would likely cause injury to an employee working about the machine. (5) That a person of plaintiff's age, intelligence, discretion, experience, and judgment, in the exercise of ordinary care, would not have discovered and understood the danger to which she was exposed in her work. (6) The plaintiff was free from contributory negligence. (7) That she had suffered damages to the amount of $12,000.

Defendant moved to set aside the verdict and for a new trial, because the verdict was contrary to the evidence and the law, and because the damages assessed were excessive, and that the answers to questions 1, 2, 3, 4, 5, and 6 be stricken out, and that the court answer them, respectively, in the affirmative or negative, so as to find on each question the contrary to that of the jury. This motion was denied, and judgment was awarded the plaintiff for the damages found and for costs. This is an appeal from such judgment.

For the appellant there was a brief by *Vilas, Vilas, Jenner & Freeman,* and oral argument by *E. P. Vilas.*

For the respondent there were briefs by *I. B. Kirkland* and *Eastman & Martineau,* and oral argument by *Mr. Kirkland* and *Mr. P. H. Martineau.*

SIEBECKER, J. It is urged that plaintiff assumed the risk of the negligence of which she complains as the cause of her injury. If she knew, or under the circumstances ought to have known, the danger of which she now complains as negligence, then she assumed the risk and cannot recover. There is no dispute but that she was in the proper place for the per-

formance of her duty at the time of the accident. She had but little general knowledge of machinery and she did not understand the relation of one part to the others. She had no special knowledge of the construction and operation of the machine in question aside from a general impression that she gathered while observing it in operation. It appears that she did not know that set-screws were used to fastened the slitters to the revolving shaft. So far as the record shows, these set-screws could not be seen when the shaft was in motion, and plaintiff did not see the shaft and the attachments except when in operation. It is claimed that the warning given her of the danger of injury to her fingers from the knives and of getting her hand caught in the slitters was sufficient to apprise her of the danger from the set-screws holding the slitters in position on the shaft. It is not apparent how such a warning could lead her to know of the existence of the set-screws, or of the danger of coming in contact with them. Knowledge of the liability of injury to her hands by contact with the knives or slitters in removing the paper shavings from them, and an appreciation of the risk arising from the use of these set-screws, are widely different things, and any information imputable to her as to the former furnishes no ground for holding that this would naturally have informed her of the danger incident to the latter.

It is also contended that the court erred in submitting the question of plaintiff's contributory negligence, and whether or not, in view of her age, intelligence, discretion, and judgment, she ought in the exercise of ordinary care to have discovered and understood the dangers to which she was exposed. Knowledge of all obvious dangers is imputed to an adult servant and he assumes all risks incident to them. The same rule applies to minors in so far as their age, intelligence, discretion, and judgment enables them to comprehend and appreciate these obvious dangers. We think the court held correctly in submitting these questions to the jury upon the facts and circum-

stances shown by the evidence. It did not appear that she in fact knew of the danger, and it cannot be said as a matter of law that in view of her age, intelligence, experience, discretion, and judgment she ought to have discovered and understood it. *Chopin v. Badger P. Co.* 83 Wis. 192, 53 N. W. 452; *Luebke v. Berlin M. Works,* 88 Wis. 442, 60 N. W. 711; *Renne v. U. S. L. Co.* 107 Wis. 305, 83 N. W. 473; *Thompson v. Edward P. Allis Co.* 89 Wis. 523, 62 N. W. 527.

It is claimed that the question of proximate cause is not covered by the verdict or by the court's instructions to the jury. The jury by the special verdict found that the defendant was negligent in using the set-screw on the machine at the place and in the manner it did, and that it thereby rendered the plaintiff's working place unsafe; that plaintiff's hair caught on this set-screw while she was engaged in the performance of her duty and that it thereby caused her injury; and that a man of ordinary intelligence and prudence should reasonably have anticipated that the presence of the set-screw would cause some injury to employees working about the machine. Taking these facts as so found, it appears that the injury was actually caused by defendant's negligence; that it was the natural and probable result of it; and that defendant as a person of ordinary intelligence and prudence ought, in the light of attending circumstances, to have foreseen that it would probably cause some one injury. This sufficiently covers all the essential elements of proximate cause, and the court was not required to give further explanation than it did in submitting the question of proximate cause to the jury.

It is contended that the court gave the jury general instructions on questions of ultimate fact and thereby transgressed the rule requiring that instructions be confined to an explanation of the questions of the special verdict, without informing the jury of the legal effect of their answers to the questions. It is averred that the instructions plainly informed them of the legal effect of their findings on negligence, contributory

negligence, and assumption of risk. An examination of the charge shows that this claim is well founded. Before giving instructions on the special verdict on different aspects of the case, the court charged the jury generally concerning the nature and theory of plaintiff's case, and the classes of facts they would need to consider in negligence cases, and then stated what he intimates had been communicated to them by counsel:

"If this injury was the result of a pure accident for which nobody was to blame, of course the defendant is not liable, and the plaintiff has no right to recover anything from them. . . . In other words, there can be no liability on the part of anybody resulting from a pure accident. It requires something else in order to create a liability."

This certainly was plainly information to the jury that if they found defendant was not negligent in causing the accident no liability would result, and that to make defendant liable they must find negligence on its part. Another instruction informed them generally as to the duty of the master to furnish a safe place for his servants to perform their duties. This was not required to inform them of what constituted a reasonably safe place and manifestly apprised them of the legal effect of a finding that the master had failed in his duty in this respect. Again, in connection with the question of the verdict as to whether plaintiff was injured by her hair catching on the set-screw, the jury was told, "The plaintiff bases her case upon the proposition that she was injured in that way," which is saying in effect that, if the jury found that she was not so injured, then she had failed to show the grounds necessary to entitle her to recover. This instruction was in effect repeated in submitting question No. 2 of the verdict, in a like prejudicial way. The court gave a number of quite lengthy instructions upon question 3, involving the question of negligence in respect to the set-screw, in which the employer's duty under the statutes (sec. 1636*j*, Stats. 1898) to guard and securely protect shafting that may be dangerous to employees was repeatedly adverted to and explained to the

jury in different ways. They plainly informed the jury that no liability would follow if defendant was found free from negligence in this respect. These instances suffice to show that the general instructions given were clearly prejudicial to the defendant's statutory rights to have the cause determined by a special verdict, "entirely uninfluenced by any thought as to the final result to be reached by any application of the law to the facts." The practice of giving instructions which impart such information has been considered so often that we cannot hope to add anything further by way of explanation or condemnation. Among the many cases on the subject we call attention to those collected in *Lyon v. Grand Rapids,* 121 Wis. 609, 99 N. W. 311. An invasion of this right of the parties to litigation operates to deprive them of a valuable statutory right, and as stated in *Gerrard v. La Crosse City R. Co.* 113 Wis. 258, 89 N. W. 125, in speaking of the effect of giving such instructions: "For this reason there must be a reversal of the judgment, irrespective of any other question." *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36.

Another objection to the charge was that abstract propositions were given on questions submitted to the jury without adequately covering the issues by instructions applicable to the facts. Since the instructions given were not erroneous, and since no written requests were made for instructions on these subjects, no valid exception can be urged on this ground. *Hacker v. Heiney,* 111 Wis. 313, 87 N. W. 249; *Schroeder v. Wis. Cent. R. Co.* 117 Wis. 33, 93 N. W. 837; *Cupps v. State,* 120 Wis. 504, 97 N. W. 210, 98 N. W. 546; *Taylor v. Seil,* 120 Wis. 32, 97 N. W. 498.

The exceptions urged to the admission of evidence over defendant's objection are without prejudice. The evidence was material and relevant to the issues being litigated and was properly submitted to the jury.

The amount of damages awarded by the jury is assailed as

grossly excessive under the facts established by the evidence. It is contended that the evidence fails, as claimed by plaintiff, to show permanent lesions caused by the injury. There is evidence tending to show that she has suffered pain and is now subject to attacks of sickness as a result of the injury, and evidence tending in some degree to support a probability that these conditions may be permanent. The direct as well as the opinion evidence on these questions is uncertain and does not furnish a clear and substantial basis for an inference that these afflictions all resulted from the injury, and it falls short of that reasonable certainty necessary to show that they are the permanent results of lesions caused by the injury. Since a new trial must be awarded wherein the proof of plaintiff's injuries may be more clearly and satisfactorily shown, we will express no opinion on the subject of the amount of damages.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

GAFFNEY, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

January 11—January 30, 1906.

Railroads: Negligence: Injuries to employees: Fellow-servant: Statutes: Special verdict: Construction.

1. In an action for the negligent injury of an employee it appeared, among other things, that plaintiff, a wiper in a railway company's roundhouse, required from time to time to go out on its engines to help supply them with water, rode out from the roundhouse on an engine to the water tank for the purpose of assisting the engineer, the engineer directing him to get upon the engine. When the tank was reached the engine was stopped, and plaintiff pulled down the spout for the purpose of filling the

engine tank with water, but, after raising the spout and climbing down the rear end of the engine, he was ordered by the engineer to ascend again and raise the spout higher, which he did, and then climbed down again behind the engine and was injured. *Held*, that plaintiff was a fellow-servant of the engineer within the calls of sec. 1816, Stats. 1898.

2. The protection of sec. 1816, Stats. 1898, continues until the employee is out of the danger incident to the employment.
3. As long as plaintiff was upon the engine in the discharge of his duties he was "riding" and within the protection of sec. 1816, Stats. 1898, although the engine at times during the performance of such duty was stationary.
4. In such case the jury found that plaintiff descended from the tender to the ground before the engine started back after he threw the spout up a second time, and was struck by the brake beam of the engine backing up as he stepped off the same. *Held*, that the fair construction of these findings is that plaintiff was struck as he stepped to the ground from the brake beam of the engine.
5. MARSHALL, J. (dissenting), is of the opinion that such findings are inconsistent, and that the jury did not find with sufficient definiteness to furnish a proper basis for a judgment in favor of plaintiff.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

The defendant is a railroad corporation, and this action was commenced to recover damages for injuries sustained by plaintiff while in its employ. It is claimed by plaintiff that, in the services in which he was engaged at the time of the injury, he was within the protection of sec. 1816, Stats. 1898, and therefore is entitled to recover on account of the negligence of a co-employee. The plaintiff's contention is that he was employed by defendant as a wiper, but that it was his duty, when called upon, to assist engineers of the defendant company in taking engines from the roundhouse to the water tank to be filled with water, and after being so filled placing them on a side track in the yard, and that in the performance of such duty it at times became necessary to open and close switches and give signals for the moving of engines. At the

time of the injury he was engaged in such service. The trial resulted in the following verdict:

"(1) Did the plaintiff *Gaffney* fall to the ground from the rear of the tender, while it was in motion, at or near the point where the engine ran upon his arm? *Answer.* No.

"(2) If you answer the last question 'No,' then answer this: Did *Gaffney* descend from the tender to the ground before the engine started to move back, after he threw the spout up a second time? *A.* Yes.

"(3) If you answer the second question 'Yes,' then answer this: Was the plaintiff struck by the brake beam of the engine backing up as he stepped off the same, drawn along the track with his legs under the brake beam, while he held on to the pin-lift with his hands, from the water tank to a point on the track westerly therefrom about 100 feet? *A.* Yes.

"(4) Did *Gaffney* signal to Joachim 'All right,' after the spout was thrown up a second time, and before Joachim moved the engine backward? *A.* No.

"(5) If the answer to the first question be 'No,' then answer this: Was Joachim guilty of negligence in so moving the engine backward without signal from *Gaffney*? *A.* Yes.

"(6) If you should answer the fifth question 'Yes,' then answer this: Should a man of ordinary intelligence and prudence in Joachim's situation have reasonably anticipated that *Gaffney* would be injured by moving the engine as Joachim moved it? *A.* Yes.

"(6½) Did Joachim hear *Gaffney's* first outcry? *A.* No.

"(7) Did Joachim use all reasonable effort to stop the engine as soon as he heard *Gaffney's* outcry? *A.* Yes.

"(8) If you answer the second question 'Yes,' then answer this: Did *Gaffney,* under all the facts and circumstances, use ordinary care in descending from the tender at the place and in the manner he did? *A.* Yes.

"(9) At what amount do you assess the plaintiff's damages? *A.* $4,500."

Both parties moved for judgment on the verdict, and the court rendered judgment for defendant on the ground that the plaintiff when injured was not within the protection of sec. 1816, Stats. 1898, from which judgment this appeal was

taken. Plaintiff assigns as error the denial of his motion for judgment and the granting of defendant's motion for judgment.

For the appellant there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

H. O. Fairchild, of counsel, for the respondent.

KERWIN, J. It is claimed by respondent that "the plaintiff has neither allegation in his complaint, proof in the case, nor finding of the jury to sustain a judgment in his favor." The first question presented, therefore, is whether the complaint brings the plaintiff within the protection of the statute. That is to say, whether or not at the time of the injury plaintiff was engaged "in operating, running, riding upon, or switching . . . engines or cars" within the meaning of the statute. The complaint, after alleging that defendant is a railroad corporation, further alleges, in effect, that on the 20th day of March, 1903, plaintiff entered into the employ of the defendant as a wiper at its roundhouse in the city of Green Bay, and, among other duties imposed upon him, was required from time to time to go out from the roundhouse upon defendant's engines to help in supplying them with water from defendant's tanks; that on the 31st day of March, 1903, while in the service of defendant, he was required to go out upon one of its engines from the roundhouse to the water tank to assist in supplying said engine with water; that on said occasion plaintiff rode out upon said engine, one Joachim acting as engineer and operating the same, and was required to lower the spout to fill the tank of the engine with water, and afterwards raised it, then descended from the engine to the ground, when he was immediately ordered by the engineer to go upon the engine and raise the spout higher, which he did; that immediately after having raised the spout he again descended to the ground at the rear of the engine and in the presence of the engineer, the engine being stationary until the instant he stepped upon

the track, and before he had time or opportunity to step off the track and out of the way of the engine the engineer negligently and without warning or notice, and without waiting for notice or signal to move, caused the engine to be negligently and recklessly moved backward upon plaintiff, causing the injury complained of. We think the allegations of the complaint bring plaintiff fairly within the protection of the statute. The contention of counsel for respondent is that neither finding of the jury, the proof made, nor allegations of the complaint entitle plaintiff to recover. In other words, that plaintiff was neither operating, running, nor riding upon the engine at the time of the injury, hence was not within the protection of the statute under the rule established in *Medberry v. C., M. & St. P. R. Co.* 106 Wis. 191, 81 N. W. 659, and other decisions of this court. We think the verdict is supported by the evidence, and the main inquiry is whether it is sufficient to sustain a judgment for plaintiff. The question of whether plaintiff signaled the engineer, Joachim, before the injury was litigated upon the trial and the jury found that he did not. The jury further found that Joachim was guilty of negligence in moving the engine backward without waiting for a signal from plaintiff, and that the plaintiff descended from the tender to the ground before the engine started to move back after he had thrown the spout up the second time, and was struck by the brake beam of the engine backing up as he stepped off, and was drawn along the track with his legs under the brake beam.

From these findings it is obvious that the plaintiff was struck and injured by the moving engine immediately upon his descent to the ground in the rear of the engine, after raising the spout as required to do by the engineer. And the question arises whether he was, at the time of injury, within the protection of the statute. Under the decisions of this court the particular service being performed at the time of injury is the test as to whether the plaintiff is within the pro-

tection of the statute. Was the plaintiff operating, running, riding upon, or switching at the time of injury? There is testimony to the effect that on the night of the injury plaintiff rode out from the turntable on the engine to the tank for the purpose of assisting the engineer, and that the engineer directed him to get upon the engine; that when he reached the tank the engine was stopped, and he pulled down the spout for the purpose of filling the engine with water; that after raising the spout he climbed down the rear end of the engine and was ordered by the engineer to ascend again and raise the spout higher, which he did, and then climbed down again behind the engine and was injured. It seems very clear that had he been injured while upon the engine in the performance of his duties he would have been entitled to the protection of the act, because within the class favored by it, and it seems equally clear that protection should extend to him, at least, until he had descended from the engine and was removed from the dangers incident to the employment. It cannot be said that the statute afforded him protection while upon the engine in the discharge of his duties, but that such protection ceased immediately upon reaching the ground and before he had time to escape from the moving engine. If entitled to the protection while in such employment, it is difficult to see why protection should not continue until he was out of the danger to which he was exposed while upon the engine.

We do not think the cases relied upon by counsel for respondent lay down a different doctrine. The learned circuit judge in an opinion which is part of the record places defendant's right to judgment upon the ground that plaintiff was not at the time of injury within the class which entitled him to the protection of sec. 1816, Stats. 1898, and in support of his opinion relies upon *Smith v. C., M. & St. P. R. Co.* 91 Wis. 503, 65 N. W. 183; *Ean v. C., M. & St. P. R. Co.* 95 Wis. 69, 69 N. W. 997; *Hibbard v. C., St. P., M. & O. R. Co.* 96 Wis. 443, 71 N. W. 807; and *Medberry v. C., M. & St. P.*

R. Co. 106 Wis. 191, 81 N. W. 659. But we think the case at bar is not in conflict with the rule of these cases. *Smith v. C., M. & St. P. R. Co.* is where plaintiff was at work repairing a car standing upon the track and was injured by another car being negligently pushed against the one upon which he was at work, and it was held that was not within the class defined by the statute. In *Ean v. C., M. & St. P. R. Co.* the plaintiff was a freight handler and was assisting in pushing a car by hand into position before the freighthouse door, and it was held that he was not employed in one of the branches of the railway service covered by the statute at the time of injury. So, in the *Hibbard Case,* plaintiff was a warehouseman and was injured while engaged in sealing freight cars loaded at the station. The court said:

"Plaintiff was not at the time of his injury engaged in 'operating, running, riding upon, or switching a car. . . . Sealing the door of a car, plainly, is not operating or running it."

And in the *Medberry Case* plaintiff was a conductor, and it was part of his duty to see to the making up of trains and have certain freight cars unloaded, and while the car was being unloaded he stood by watching an open switch and waiting to close the door when the car was unloaded, and while so standing was injured by the negligence of the men unloading the car, and the court held that he was not at the time of the injury engaged in operating, running, riding upon, or switching the train, within the meaning of the statute.

We think the case at bar is not out of harmony with the *Medberry Case* and other cases in this court referred to, for the reason that plaintiff's duties when assisting as he was at the time of injury, and which duties involved riding upon the engine, brought him within the class favored by the statute, assuming that he was still acting in such capacity and had not ceased such operating at the time he was injured. We think, as before observed, that he had not, at the time of the injury, ceased to be in the performance of the hazardous em-

ployment covered by the statute. It is said by counsel for respondent that the riding must be incident to the work or plaintiff must have been required to ride, but there is evidence that he was ordered to ride by the engineer, and the riding was, we think, under the employment fairly incident to the work. And so long as plaintiff was upon the engine in the discharge of his duties he was "riding" and within the protection of the statute, although the engine at times during the performance of such duty was stationary. Counsel for respondent insists that the jury found plaintiff had descended to the ground before the engine started to move back, and before the injury, and therefore he could not be riding upon the engine when he had already descended to the ground. The jury found in the second finding that "*Gaffney* descended from the tender to the ground before the engine started to move back after he threw the spout up a second time." And the third finding found that plaintiff was "struck by the brake beam of the engine backing up as he stepped off the same." The fair construction of these findings is that *Gaffney* was struck as he stepped to the ground from the brake beam of the engine. This being so, the findings bring plaintiff within the class favored by the statute. At the time of injury he was actually engaged in the service, although he had reached the ground, but had not had time before the injury to step off the track. The protection of the statute continued for such time as was reasonably necessary for him to extricate himself from the perils incident to the employment. It follows that the findings bring the plaintiff within the protection of the statute, and he was entitled to judgment on the verdict.

By the Court.—The judgment of the court below is reversed, and the cause remanded with instructions to enter judgment for plaintiff.

MARSHALL, J. (*dissenting in part*). The court,—fully recognizing the limitations of sec. 1816, Stats. 1898, as con-

strued by several decisions of this court, to the effect that no one is within its protection as to an injury to him unless he was at the instant of such injury of the class mentioned therein, and engaged in some one of the particular services specified,—hold that the judgment below should be reversed upon the ground that on the verdict plaintiff is entitled to recover. My opinion as to whether he was within the class mentioned in the statute is not material to my dissent. My brethren hold that he was engaged at the time of his injury in a particular service covered by the statute, in that he was, pursuant to his employment, riding upon the engine which collided with him inflicting the injuries complained of.

It is conceded that appellant was not in the physical sense riding on the engine when injured. But it is held that riding on the engine within the meaning of the act, as regards one who has actually entered upon services requiring such riding, must necessarily continue till he has an opportunity to leave the engine, the same being in motion, and to retire from dangerous proximity thereto as regards the movement, in progress, or momentarily to commence. In that view it is thought by my brethren that the jury found, in effect, that the plaintiff at the time he was struck by the engine had not wholly left it, in that though he had stepped to the ground he had not been afforded opportunity to retire safely from the region of its immediate movements. In my judgment, the jury did not so find with sufficient definiteness to furnish a proper basis for the judgment even if the theory of my brethren as to when appellant's service in riding upon the engine terminated be correct.

As I read the record the case was presented upon two distinct theories. That of the appellant was that he was injured while he was descending from the engine to the ground. The theory of the respondent was that before he was struck he had descended from the engine, wholly severed his relation therewith and proceeded some distance therefrom on his way to

the roundhouse. Two questions were framed, as it seems, to cover those opposite theories. One read as follows: "Did *Gaffney* descend from the tender *to the ground before the engine started to move back,* after he threw the spout up a second time?" The other is in these words: "Was the plaintiff struck by the brake beam of the engine *backing up as he stepped off the same?*" They aptly fit the diverse theories. It is hard to comprehend how plaintiff could have descended to the ground *before the engine started* to move back and at the same time been struck by it as it was backing up when he was in the act of stepping off.

The jury answered both questions in the affirmative. I am entirely unable to reconcile the answers. To my mind, it seems that the jury first found in favor of respondent, which, I apprehend, on the face of things would have entitled it to judgment. Then followed the finding in appellant's favor, which, according to the view of the court, entitled him to a judgment. How can it be said appellant was either struck while stepping to the ground or struck after he stepped to the ground and before he had time to step away from the moving engine, because: according to one finding he was actually on the ground before the engine started and for aught the jury found he may not only have been on the ground, but a considerable distance from the engine, as counsel for respondent claims.

In the opinion of my brethren the two findings are combined without explanation of their apparent inconsistency. Such combination of the findings in the opinion suggests an impossible happening. "The plaintiff descended from the tender to the ground before the engine started to move back . . . and was struck by the brake beam of the engine backing up as he stepped off." That is to say, the engine was stationary till the plaintiff was on the ground, nevertheless it was moving backward when he was in the act of stepping to the ground. It is useless to say more to make plain why I cannot agree with the decision of the court.

PRESTON, Appellant, vs. THAYER and others, Respondents.

January 11—January 30, 1906.

Tax titles: Tax deeds: Evidence: Admissibility: Presumptions: Statutes of limitation: Suspension.

1. Under sec. 1176, Stats. 1898 (providing that a tax deed duly witnessed and acknowledged shall be presumptive evidence of the regularity of all the proceedings, from the valuation of the land by the assessor up to and including the execution of the deed), a tax deed is admissible in evidence without proof in detail of the consecutive steps required to be taken by the taxing officers, although such consecutive steps are fully pleaded, where there is nothing in the allegations of the pleading which tends to destroy or impair the presumptive evidence of such tax deeds by virtue of such statute.
2. Tax deeds on vacant and unoccupied lands were severally recorded between February 1, 1898, and May 31, 1898, and the grantee (one of the present defendants) on October 5, 1899, commenced actions thereon under sec. 1197, Stats. 1898, to bar the original owner (the present plaintiff), which actions, after answer setting up irregularities fatal to the tax deeds, were discontinued September 21, 1903. On September 23, 1903, the present action of ejectment was commenced to accomplish what was sought to be accomplished by the defense in each of the other actions. *Held*, under sec. 4249, Stats. 1898 (providing, as to a defense, that the time of the commencement of the plaintiff's action shall be deemed the time when the claim for relief as to such defense is interposed), and sec. 4250 (providing that, when a defendant in an action has interposed an answer as a defense upon which he would be entitled to rely in such action, the remedy upon which at the time of the commencement of such action was not barred by law, and the complaint is dismissed or the action is discontinued, the time which intervened between the commencement and the termination of such action shall not be deemed a part of the time limited for the commencement of an action by the defendant to recover for the cause of action so interposed as a defense), that the three-year statute of limitation (sec. 1188, Stats. 1898) had not run against plaintiff, and therefore evidence showing the invalidity of such tax deeds was admissible.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action of ejectment commenced September 23, 1903, by the plaintiff, claiming title to the lands described by mesne conveyances from the government, against the defendants, who claim title under tax deeds. It is conceded that the plaintiff's title is good unless it has been divested by one or more of the tax deeds. It is undisputed that the seven tax deeds under which the defendants claim title were each and all issued to the defendant *Minnie A. Thayer,* and were recorded on and between February 1, 1898, and May 31, 1898, inclusive. It is conceded that six of the tax deeds were regular upon their face and that the lands described in each of said deeds were vacant and unoccupied at the times of recording such deeds, respectively, and remained so vacant and unoccupied continuously for more than three years thereafter and for more than three years prior to the commencement of this action. October 5, 1899, *Minnie A. Thayer,* the grantee in each of said deeds, commenced seven actions, each against this plaintiff, *William D. Preston,* and wife, who were then nonresidents of this state, and others, to bar them from all right, title, interest, or claim in or to the lands covered by said tax deeds, respectively, or any part thereof, and for the costs and disbursements of the action. Orders for the service of the summons by publication in each of said seven actions were obtained October 5, 1899, and such service on *Preston* and wife and others by publication was completed January 2, 1900. April 21, 1900, *Mrs. Thayer's* attorney made affidavit of default of *Preston* and wife and other defendants in each of those seven actions, and May 5, 1900, judgment by default was taken in each of those actions, and May 19, 1900, each of those seven judgments was recorded. April 28, 1903, *Preston* and wife, as defendants in each of those actions, served a proposed verified answer therein on *Mrs. Thayer's* attorney in each of those actions and upon orders to show cause why each of said seven judgments should not be set aside as to the defendants *Preston* and wife therein, and why

said Prestons should not be permitted to serve their answer in each of said actions; and upon the hearing of said applications the court on May 4, 1903, by virtue of the authority given by sec. 2833, Stats. 1898, ordered in each of said actions that such default judgment be set aside, and the same was thereby set aside, as to the said *William D. Preston* and wife, upon the payment of $10 solicitor's fees and of the actual disbursements which *Mrs. Thayer,* the plaintiff therein, had incurred in taking such judgment, and that the said *Preston* and wife be permitted to file their answer in each of said seven actions, which was done; and such orders were fully complied with by *Mr.* and Mrs. Preston. September 21, 1903, *Mrs. Thayer* gave notice to *Mr.* and Mrs. Preston in each of said seven actions that the same were respectively discontinued as to *Mr.* and Mrs. Preston, and she thereby offered to pay the costs as soon as taxed, and on the same day judgment of such discontinuance in each of said actions was duly entered. Two days after such discontinuance *Mr. Preston* commenced this action of ejectment. *Mrs. Thayer* and the other defendants answered, and claimed title by virtue of and under said seven tax deeds, and also alleged, in effect, that the several steps in the tax proceedings upon which such tax deeds were respectively issued were regular and according to the statutes in such case made and provided. On the trial the seven tax deeds were admitted in evidence against the objections of the plaintiff, on the ground that under the allegations of the answer the burden was on the defendants to prove that the tax proceedings upon which said deeds respectively were issued were regular and valid before the deeds were admissible in evidence. Thereupon the plaintiff offered to prove that such proceedings upon which each of such tax deeds was respectively issued were irregular and not authorized by the statutes; but such offers were all excluded on the ground that the plaintiff was barred from making such proof by the three-year statute of limitation. At the close of the trial

the court found, in effect, that the seven tax deeds were respectively valid upon their face, and that the plaintiff's cause of action as to all the lands in question was barred by the statutes of limitation, and hence that the defendants were the owners of the lands described in fee simple and were entitled to judgment in this action dismissing the complaint and for their costs and disbursements herein, and ordered judgment accordingly. From the judgment so entered the plaintiff appeals.

Upon the trial it was admitted, in effect, that if any one of the six tax deeds so conceded to be valid upon their face was not protected by the three-year statute of limitation, then the evidence so offered by the plaintiff was admissible as to each of such tax deeds, and that the same would in that event be invalid; and "it was agreed by counsel for the respective parties that if, under the pleadings and evidence, the tax deed hereinbefore set out is valid, each of the remaining six tax deeds is likewise valid, but that if, under the pleadings and evidence, the tax deed so set out is invalid, each of said remaining six tax deeds is likewise invalid and void. In other words, it was agreed that, according as the tax deed hereinbefore set out stands or falls, the remaining six tax deeds should stand or fall."

For the appellant there were briefs by *J. W. Hicks* and *Lamoreux & Shea,* and oral argument by *Mr. Hicks* and *Mr. W. F. Shea.*

For the respondents there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *Allan T. Pray.*

CASSODAY, C. J. The statute provides that a tax "deed duly witnessed and acknowledged shall be presumptive evidence of the regularity of all the proceedings, from the valuation of the land by the assessor up to and including the execution of the deed, and may be recorded with the like effect as other conveyances of land." Sec. 1176, Stats. 1898; *Mitchell I. & L. Co. v. Flambeau L. Co.* 120 Wis. 545, 548, 98 N. W.

530. Nevertheless counsel for the plaintiff contend that the court improperly admitted such tax deeds in evidence for the reason that the answer alleged, in reference to each of said tax deeds, that the lands therein described were subject to taxation and duly assessed for taxation and that the taxes were duly levied thereon, setting out in detail the consecutive acts required to be performed by the taxing officers from the valuation of the land up to and including the issuing of the tax certificates on which the tax deeds were based, but that the defendants failed to prove the facts so alleged and hence that the tax deeds were inadmissible in evidence. There is nothing in those allegations which tends to destroy or impair the "presumptive evidence" of such tax deeds by virtue of the statute quoted. In the case relied upon by counsel the plaintiff introduced a sheriff's deed on execution sale, which under the statute was *prima facie* evidence of title in the person named as grantee therein. Thereupon he introduced in evidence the judgment and the docket thereof, the execution issued thereon and its delivery to the sheriff, and its return to the proper clerk about three months afterwards; but no return of the sheriff was indorsed thereon, nor anything to indicate his doings upon or in respect to such execution, and there was a failure to show any publication of notice of sale, and so it was held that the recitals in the sheriff's deed were insufficient to supply such defects. *Claflin v. Robinhorst,* 40 Wis. 482. The case differs materially from the one at bar. As stated by a standard text-writer, "a presumption cannot contradict facts or overcome facts proved." Lawson, Presumptive Evidence, 659, rule 119. Certainly a party having a presumption in his favor may himself prove that such presumption is without foundation.

The more important question in this case is whether the plaintiff, as such former owner, is barred from maintaining this action because it was not "brought within three years next after the recording of such deeds," as prescribed in sec. 1188, Stats. 1898. It is conceded, in effect, that if the three-

year limitation had not run and the seven tax deeds are open to attack, then that they must be declared void. The case, therefore, turns upon whether the three-year statute of limitation had or had not run when this action was commenced. The plaintiff contends that the running of that statute was stopped and held in abeyance for more than four years by the pendency of the actions brought by *Mrs. Thayer* against this plaintiff and his wife and others, under sec. 1197, Stats. 1898, to bar them from all right, title, interest, and claim in said lands, or any part thereof, and in which actions the plaintiff and his wife, *Mr.* and Mrs. Preston, interposed an answer and defense, as mentioned in the foregoing statement. In support of such contention counsel for the plaintiff rely upon the section of the statute which declares that:

"The periods of limitation, unless otherwise specially prescribed by law, must be computed from the time of the accruing of the right to relief by action, special proceedings, defense or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party as a plaintiff or defendant in the particular action or special proceeding, except *that as to a defense,* setoff or counterclaim *the time of the commencement of the plaintiff's action shall be deemed the time when the claim for relief as to such defense,* setoff or counterclaim *is interposed.*" Sec. 4249, Stats. 1898.

And also the section which declares that:

"*When a defendant in an action has interposed an answer as a defense,* setoff or counterclaim *upon which he would be entitled to rely in such action the remedy upon which, at the time of the commencement of such action, was not barred by law, and such complaint is dismissed or the action is discontinued the time which intervened between the commencement and the termination of such action shall not be deemed a part of the time limited for the commencement of an action by the defendant to recover for the cause of action so interposed as a defense,* setoff or counterclaim." Sec. 4250, Stats. 1898.

Counsel for the defendants contend that neither of these sections is applicable. But, as we read these sections, the case presented comes squarely within the provisions of both sections. *Mrs. Thayer* commenced her seven actions under sec. 1197, Stats. 1898, to bar the original owners, October 5, 1899. The only service on *Preston* and wife and others, non-resident owners, was by publication, which was completed January 2, 1900. Judgment by default was taken. *Preston* and wife interposed a defense by verified answer, and the court set aside each of the judgments as to them, and they were allowed to defend under the provision of the statute giving such right. Sec. 2833, Stats. 1898. September 21, 1903, *Mrs. Thayer* discontinued her seven actions, and judgments were entered accordingly. Two days afterwards *Mr. Preston* commenced this action, to accomplish what he sought to accomplish by the defense in each of the other actions, but in which he was defeated by the discontinuance of those actions. The exception contained in sec. 4249 is to the effect "that as to a defense . . . the time of the commencement of the plaintiff's action shall be deemed the time when the claim for relief as to such defense . . . is interposed." In other words, *Preston* and wife must be deemed to have interposed their defense in each of the seven actions at the time they were respectively commenced, October 5, 1899. At that time the remedy which *Mr.* and Mrs. Preston sought to obtain in such seven actions, and which *Mr. Preston* here seeks to obtain, was not barred by the statute of limitation. Sec. 1188. And so the section last quoted declares, in effect, that "when a defendant in an action has interposed an answer as a defense, . . . upon which he would be entitled to rely," as *Mr.* and Mrs. Preston did in each of the seven actions mentioned, and the complaint in such action "is dismissed or the action is discontinued the time which intervened between the commencement and the termination of such action shall not be deemed a part of the time limited for the commencement of an action

by the defendant to recover for the cause of action so interposed as a defense." Sec. 4250. That is to say, the time from October 5, 1899, when *Mrs. Thayer* commenced her seven actions, to September 21, 1903, when she discontinued those actions, is not to be deemed a part of the time limited for *Mr. Preston* to commence this action to recover for the cause of action so interposed as a defense in each of the seven actions. We must hold that the three-year statute of limitation (sec. 1188) had not run against the plaintiff, as such original owner, when this action was commenced, and hence that the evidence offered by the plaintiff showing the invalidity of each of several tax deeds was admissible and shows that each of said tax deeds is void. Under the stipulation mentioned in the foregoing statement it is unnecessary to consider any other question.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in favor of the plaintiff and against the defendants as indicated in this opinion.

DUNBAR, Respondent, vs. MONTREAL RIVER LUMBER COMPANY, Appellant.

January 11—January 30, 1906.

Contracts: Construction: "Causes of action on account of any trespass:" Trespass: Survey: Costs: Taxation: Review: Power of court.

1. Plaintiff claimed under a clause in a warranty deed: "The grantor hereby assigns and transfers to the grantee all its claims, demands, or causes of action for or *on account of* any trespass upon the real estate above described." *Held*, that the words "on account of any trespass" covered causes of action for conversion by defendant of timber cut by a third party as the trespasser.

2. Under sec. 2922, Stats. 1898 (providing that when in actions of trespass, trover, and replevin, founded upon the unlawful cutting of timber, or such cutting and its conversion, the amount of plaintiff's recovery exceeds $50, the plaintiff shall recover full costs, including therein any actual reasonable expense of one survey and ascertainment of the quantity of timber so cut, or cut and converted, made after the commencement of the action by one surveyor and one assistant, if duly proved as a necessary disbursement), only the per diem and actual and reasonable expenses of one surveyor and one assistant can be taxed, and it is error to allow either the wages or expenses of axmen, chainmen, cooks, or flagmen, in addition to the one assistant.

[3. Whether sec. 2922 authorizes necessary expenses in addition to mere per diem of the surveyor and assistant, suggested but not decided.]

4. On the facts, stated in the opinion, an allowance of $100 for the entire reasonable expenses of a survey is held sufficient.

5. On appeal from the taxation of costs made by the taxing officer, the function of the circuit court is simply to review his conclusion, not to try the question *de novo*.

APPEAL from a judgment of the circuit court for Iron county: JOHN K. PARISH, Circuit Judge. *Modified and affirmed.*

For the appellant there was a brief by *Lamoreux & Shea,* and oral argument by *W. F. Shea.*

For the respondent the cause was submitted on the brief of *Sanborn, Lamoreux & Pray.*

WINSLOW, J. This is an action to recover damages for the cutting of timber upon eight forty-acre tracts of land, the complaint containing one count for trespass and one count for conversion, both counts covering the same lands and timber. At the time the acts of trespass and conversion were committed the title to the lands and timber was in the plaintiff's grantor, the Hoffman Land Company. As to one of the forty-acre tracts the jury found that the trespass thereon was committed by the defendant, as to two of the tracts there was no proof, and as to the remaining five tracts the jury found that

the trespass was committed by one Stabler and that the logs were afterwards sold to and converted by the defendant, and judgment was rendered for the value of the logs which the defendant cut as well as the logs which it converted.

Prior to the commencement of the action the Hoffman Land Company sold and conveyed all the lands in question to the plaintiff by warranty deed, such deed containing the following clause:

"The grantor hereby assigns and transfers to the grantee all its claims, or causes of action for or *on account of* any trespass upon the real estate above described."

The only question upon the merits raised upon the appeal is as to the correctness of that part of the judgment which awards the plaintiff a recovery for the logs converted by the defendant. The argument is that the assignment above quoted does not cover a cause of action for conversion, but only causes of action for trespass. Had the assignment not contained the words "on account of" the appellant's argument would be strong that only causes of action for trespass were assigned, but the language is "causes of action for or *on account of* any trespass." This is a question of construction only, and the language used must be construed reasonably to give every word effect, if possible. Giving it the construction contended for by the appellant, the words "on account of" are absolutely superfluous and without meaning, because all claims for trespass are effectually assigned without them. "On account of" doubtless means "by reason of." *Brown v. German-American T. & T. Co.* 174 Pa. St. 443, 461, 34 Atl. 335, 343. A cause of action in trover for the conversion of logs previously cut by a trespasser certainly seems to be a cause of action resulting "by reason of" the initial trespass; the conversion is a natural and legitimate result of the trespass. It is difficult to see to what other claims or causes of action the words can refer, except claims or causes of action for conversion; and, as we have seen, the words should be given some meaning if

there be a reasonable meaning consistent with the evident intent of the parties which can be given to them. There is little in the way of authority which throws light upon the question, but we are satisfied that the trial court was right in construing the assignment as covering causes of action for conversion.

The remaining question in the case arises upon the taxation of costs. Our statute provides in substance (Stats. 1898, sec. 2922) that when in such actions as the present the amount recovered exceeds $50 the plaintiff shall recover full costs, including therein "any actual reasonable expense of one survey and ascertainment of the quantity of timber so cut, or cut and converted . . . made after the commencement of the action by one surveyor and one assistant if duly proved as a necessary disbursement." Under this section the plaintiff presented for taxation among the disbursements of the cost bill an item of $638.15, made up of the following items:

1903.	
Nov. Paid twenty-six days' surveying and scaling trespass in town 44, 2 E	$130 00
Paid assistant for twenty-three days at $5 per day	115 00
Paid cook for twenty-four days at $2.50 per day	60 00
Paid two chainmen for twenty-five days each at $2 per day	100 00
Paid one flagman for twenty-four days at $2 per day	48 00
Paid one axman for fifteen days at $2 per day	30 00
Paid livery hire	27 00
Paid man to pack groceries from Hurley, two days	3 00
Paid for grinding axes, drayage, express, oil, lantern, and spikes	4 00
Paid for groceries and supplies	61 74
Paid for repairing broken flag	2 50
Paid for hotel bill at Hurley	12 50
Paid expenses to Wausau and return, making report, and making bill of expenses of survey	8 85
Paid railroad fare and express	26 06
Paid for field-notes and expense getting same	5 00
Paid E. Brazell for services rendered	4 50
	$638 15

Objection was made to every item of this bill, and the clerk cut down the same to $100. Upon motion for retaxation of the costs before the court the clerk's ruling was reversed and the whole sum of $638.15 was taxed and included in the judg-

ment. The appellant assigns this ruling as error. Affidavits were presented on both sides before the clerk and before the court; those submitted on the part of the plaintiff tending to show that the charges were necessary and reasonable, and those on the part of the defendant tending to show that the whole work could have been easily done by a surveyor and one assistant at an expense not exceeding $100. The statute itself is exceptional and unusual, and should receive no latitudinarian construction. It was intended to enable a plaintiff to reimburse himself for an actual and reasonable outlay of money necessary to ascertain and prove his damages, not to enable him to inflict punishment upon the defendant. While it covers the actual and reasonable expense of the survey, and thus may doubtless cover necessary expenses in addition to the mere per diem of the surveyor and assistant, it is clear that it is limited to the per diem and actual and reasonable expenses of "one surveyor and one assistant." Neither the wages nor the expenses of axmen, chainmen, cooks, or flagmen in addition to the one assistant are included. *Ita lex scripta est.*

In the present case there were but two forties surveyed as to which proof was introduced by the plaintiff. Upon one forty, forty-eight logs, aggregating 8,000 feet, were cut, and this was admitted by the answer; upon the other, nineteen logs, aggregating 8,140 feet, were cut; and the damages recovered aggregated only $469. Upon the face of the charge it seems exorbitant, if not actually made in bad faith; nor is this conclusion removed by the affidavits. While the surveyor employed by the plaintiff made affidavit that the expenditures were all necessary, he included in the survey two forties in another section concerning which no testimony was introduced and no recovery had, and three competent woodsmen made affidavits positively stating that they knew the lands, had themselves gone over them, and that the entire reasonable expense of a survey of the two forties as to which testimony

was introduced would not exceed $100. This testimony seems to us far more reasonable than that of the plaintiff's witness, and evidently so impressed the clerk. We can discover no good reason for disturbing his conclusion. He was the taxing officer, and the function of the court was simply to review his conclusion, not to try the question *de novo*. *State v. Wertzel*, 84 Wis. 344, 54 N. W. 579.

By the Court.—Judgment modified by reducing the same in the sum of $538.15, and, as so modified, affirmed, with costs to the appellant.

WHITING, Administrator, Appellant, vs. HOGLUND, Respondent.

January 11—January 30, 1906.

Deeds: Sufficient delivery: Fraudulent conveyances: Evidence: Sufficiency.

1. A deed containing an erroneous description of land intended to be conveyed was duly delivered to the grantee, who returned it to the grantor for correction. The grantor thereupon executed a second deed with the proper description, and delivered the same to the register of deeds of the proper county to be recorded for the grantee's use. The deed was recorded accordingly, and thereupon it was sent by mail to the grantor for the grantee's use. *Held*, that there was a sufficient delivery of the second deed.
2. In such case the facts, stated in the opinion, are *held* to sustain a finding that such deed was not in fraud of creditors.

APPEAL from a judgment of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action by an administrator to set aside a deed of real estate made by his intestate as having been in fraud of the latter's creditors. The cause was tried by the court. The facts found were these: The intestate made a deed to the defendant

in due form, and delivered the same, of the southwest one-quarter of section 17, town 35, range 1 east in Price county, Wisconsin, intending, however, to convey the northwest one-quarter of said section. It was subsequently returned to the grantor for correction. The latter, to that end, executed a deed of the proper description of land to the defendant, and delivered the same to the register of deeds of Price county, Wisconsin, to be recorded for the latter's use. The instrument was recorded accordingly, and thereupon it was sent to the grantor by mail for the defendant's use. It was made for a valuable consideration and in good faith. The land was at the time of the death of plaintiff's intestate the property *bona fide* of the defendant. Thereon the court held that the defendant was entitled to judgment dismissing the complaint, with costs. Judgment was rendered accordingly, from which the plaintiff appealed.

G. E. Schwindt, for the appellant.

For the respondent there was a brief by *Barry & Barry,* and oral argument by *H. R. Barry.*

MARSHALL, J. Counsel for appellant present for consideration upon this appeal these questions: Was the land in controversy conveyed to respondent by a deed duly delivered in the lifetime of the grantor? If so, was such conveyance made in fraud of the creditors of such grantor? Some supposed collateral questions are treated by counsel which will receive such attention as they seem to deserve.

There is little or no question but that the facts upon which the trial court reached the conclusion that the deed was delivered occurred. In any event, upon the record, the findings in that regard must stand as verities since they cannot well be said to be against the clear preponderance of the evidence. Therefore a deed of one description of land was duly delivered to the respondent, such description not being the one intended by the parties, and such deed was returned to the

grantor for correction. A new one was made by him for that purpose covering the proper description, was delivered to the register of deeds to be and was recorded, and was thereupon returned to the grantor by mail. The court decided by inference from those facts that the delivery to the register was for the use of the grantee, and on that predicated the conclusion that, in legal effect, the delivery was to the grantee, fully recognizing that it was essential to its validity that it should pass out of the control of the grantor. It having been made for the purpose of correcting the prior erroneous instrument, which was properly delivered, the only reasonable inference is that the second delivery was for the use of the grantee. Such being the case, the instrument, the instant it came into the hands of the register for record and was duly entered by him, was beyond the control of the grantor and in legal effect under that of the grantee. The register under the obligations of his office and for the consideration to which he was entitled, impliedly, by receiving the paper, agreed to perform the service of recording it for the grantee, and thereby became his agent, to all intents and purposes, to that end.

The facts above stated make an ordinary case of one for a consideration, at the request of another, agreeing to perform a service for a third person,—a stranger to the immediate transaction. The latter, in such circumstances, upon the consummation of the transaction between such immediate parties, becomes vested with the right to have the promise as to him executed, and his status in that regard cannot subsequently be disturbed without his consent. *Tweeddale v. Tweeddale,* 116 Wis. 517; 93 N. W. 440.

But the delivery to the register under the facts of this case need not necessarily rest on the principle stated. The sending of the erroneous deed to the grantor for correction made him necessarily the agent of the grantee to do everything reasonably appropriate to that end. What followed, obviously, was appropriate. Therefore, when the new deed was

delivered to the register it was delivered by the grantee's agent, and when it was received back from the former it was received by such agent. There can be no doubt but that the instrument was demandable by the grantee of the register, regardless of the wishes of the grantor, at all times after it was delivered to such register, both upon the ground that by agreement between him and such grantor the former became the agent of the grantee, and upon the ground that the delivery was made to the register by the agent of the grantee with the intention of parting with the control of the instrument, as regards its efficiency, for the purpose indicated upon its face. The authorities along this line are numerous. The delivery of a deed by the grantor to the register of deeds for record, intending it to thereby take effect, and with the consent of the grantee, is a sufficient delivery. *Cooper v. Jackson,* 4 Wis. 537; *Buffum v. Green,* 5 N. H. 71; *Glaze v. Three Rivers F. M. F. Ins. Co.* 87 Mich. 349, 49 N. W. 595; *Moore v. Giles,* 49 Conn. 570. Delivery of a conveyance by the maker to a third person for the grantee at the latter's request, or as his authorized agent, is a sufficient delivery to give full effect to the paper. *Sargeant v. Solberg,* 22 Wis. 132; *Harrington v. Brittan,* 23 Wis. 541.

An examination of the authorities cited will show they support this as the law. The question as to whether any particular circumstance constitutes an efficient delivery of a deed or not turns on the intention of the parties. There need be only a parting with the paper by the grantor and the intent thereby to pass title and assent thereto by the grantee, though the instrument never comes to the latter's manual possession. His assent may be presumed by the mere beneficiary character of the transaction, subject to be rebutted by proof to the contrary.

Counsel for appellant argue at some length as to when a deed will or will not be reformed, citing authorities which have very little or nothing to do with a case of this sort, even

if the question of reforming the erroneous deed by judicial decree were up for consideration. There is no such question in the case since the parties reformed the instrument themselves. In any event, authorities to the effect that a deed containing a wrong description cannot be reformed if it would be void regardless of the mistake, such as a deed intending to convey a homestead, but containing the wrong description, and not signed by the grantor's wife, and authorities to the effect that, in an action to reform a land contract by rebating the purchase price because of mistake in including therein a description of land of much less value than that intended, the land included not being the property of the executory vendor, the defect cannot be cured by inserting the proper description, are entirely foreign to any question arising, or that in any event could arise in this case. Care should be taken in presenting an appeal here not to submit for consideration matters which are entirely outside of and not, in any reasonable view, applicable to the cause.

On the subject of whether the deed to respondent was made in fraud of creditors little need be said. We fail to discover anything in the brief of appellant's counsel that could well be dignified by being called a discussion of that matter, yet, as appears by the exceptions and the purpose of the action, it was a principal ground of complaint. It must be assumed counsel apprehended the findings of the trial court on that subject to be well grounded in the evidence, as it seems plain they are. Indeed, as pointed out by counsel for respondent, there does not appear to have been any evidence to avoid the deed on the ground of fraud. The evidence tending to establish fraud on the part of the grantor is exceedingly meager, and there is none whatever showing that if the grantor had a fraudulent intent it was participated in by the grantee, while it appears, as the court found, that a fairly valuable consideration was given for the land.

By the Court.—The judgment is affirmed.

CORRY, Respondent, vs. BROWN and others, Appellants.

January 11—January 30, 1906.

Joinder of causes of action: Statutes.

Sec. 1199, Stats. 1898, prescribing the elements of a complaint in an action to bar former owners of lands on which the plaintiff holds tax deeds, concludes, "And if such plaintiff have more than one such deed upon any parcel of land mentioned in such complaint, upon which he might bring such action, he shall set forth in such complaint a copy of each such deed, but as a separate cause of action." *Held*, that such section constitutes an exception to the requirements of sec. 2647, providing that each of several causes of action, in order to be united, must affect all the parties to the action.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Appeal from order overruling a demurrer on the ground that several causes of action are improperly united. The complaint is bought under sec. 1197, Stats. 1898, to bar former owners of land to which plaintiff holds tax deeds dated July 28, 1894, and sets forth two causes of action: The first upon lot No. 3 of section 30, to which *A. H. Brown* and *Clara A. Brown* are the only persons named as adverse claimants. The second cause of action is upon a tax deed of the same date as the former, but for the next year's taxes, and covers lot 3 of section 30 aforesaid, and also part of lot 3 in section 20 of the same town and range. All the defendants, including said *Brown*, are alleged to be claimants of interests in said lands in section 20.

The cause was submitted for the appellants on the brief of *Tomkins, Tomkins & Garvin*, and for the respondent on that of *Sanborn, Lamoreux & Pray*.

DODGE, J. Sec. 1199, Stats. 1898, prescribing the elements of a complaint in such an action as this, concludes with the following:

"And if such plaintiff have more than one such deed upon any parcel of land mentioned in such complaint, upon which he might bring such action, he shall set forth in such complaint a copy of each such deed, but as a separate cause of action."

This statute seems not only to permit but to require that all tax deeds held by the same owner upon any land in which he seeks to bar original owners shall be included in his complaint and made separate causes of action. This, doubtless, to the end that the court may have before it in the one litigation all tax-title rights which he claims against the specified land, so as to avoid the necessity of several lawsuits to accomplish the same ultimate result, namely, the establishment of good title in plaintiff against all former owners and their assigns. It is obvious that, when several parcels of land are included in one deed, they may, and in ordinary cases will, be owned by different persons, all of whom are manifestly authorized to be joined as parties defendant, although they may not all be interested alike in the relief demanded. The addition as a separate cause of action of the so-called foreclosure of another tax deed against any one of such parcels of land involves no additional parties, for all the owners of such parcel are necessarily made defendants in the first instance. Hence, to accomplish a very legitimate purpose, the legislature has authorized, in the case of perfecting tax titles by these proceedings to bar former owners, an exception to the requirement of sec. 2647, Stats. 1898, that each of several causes of action, in order to be united, must affect all the parties to the action. We have noticed the statement of the revisers of 1878 that sec. 1199, R. S. 1878, wherein the above-quoted clause appears for the first time, is only a rewriting

of the pre-existing statute law. Such statement cannot, however, refute the fact that the provision in question was absolutely new and had nothing in former statutes as a prototype or equivalent. The words enacted by the legislature are too clear and unambiguous to be open to construction or to permit their nullification by reference even to the revisers' notes. Appellant relies upon *Turner v. Duchman,* 23 Wis. 500; but that case was decided before the above-quoted clause was added to sec. 1199, Stats. 1898, and therefore before there was any exception to the requirement of sec. 2647, Stats. 1898, that each cause of action must affect all the parties. The rule of that case has been changed by the adoption of sec. 1199, R. S. 1878. The present complaint is authorized by such change, and the demurrer was properly overruled.

By the Court.—Order affirmed.

ROLLINS, Respondent, vs. MAXWELL BROTHERS COMPANY, Appellant.

January 12—January 30, 1906.

Service of process: Publication of summons: Foreign corporations.

It appeared, among other things, that defendant was a foreign corporation and had fully complied with the requirements of sec. 1770*b*, Stats. 1898; that it had within this state real property which had been attached in this action, and that a cause of action existed in favor of the plaintiff and against the defendant which arose within this state. Plaintiff attempted to justify a judgment in his favor based on an order of publication of the summons and personal service outside the state. *Held:*

(1) The summons and complaint might have been served on the secretary of state as prescribed in sec. 1770*b* and subd. 13, sec. 2637, Stats. 1898.

(2) A showing that the summons and complaint had been delivered to a constable for service on the defendant, and that after diligent search he was unable to find the defendant within

the state or any agent thereof on whom service could be made, does not, in such case, comply with the provisions of sec. 2640, Stats. 1898 (requiring, among other things, as a prerequisite to a valid order for publication of summons, that it must appear by affidavit that plaintiff is unable, with due diligence, to make service of the summons upon the defendant in respect to whom such order is applied for).

(3) There being no presumption of the existence of facts essential to give jurisdiction, and no valid order of publication, the court should have dismissed the action for want of jurisdiction.

APPEAL from a judgment of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This action was brought to recover $832.87, the alleged balance due on account of goods, wares, and merchandise sold and delivered by the plaintiff to the defendant (a corporation organized and existing under and by virtue of the laws of Illinois), at its instance and request, between December 17, 1902, and May 24, 1904. The complaint alleged a demand of payment and refusal to pay, and the same was duly verified October 12, 1904, and with the summons attached was filed in the clerk's office October 13, 1904. On the same day there was filed in that office the writ of attachment and the affidavit and undertaking for the same, and the sheriff's return to the effect that he had attached the defendant's real estate described, on that day, and the sheriff further returned that after diligent search and inquiry he was unable to find the defendant or any agent thereof on whom to make service of such writ, affidavit, and undertaking, and further that he was informed and believed that the defendant was a foreign corporation, having its principal office in Chicago, and had no agent within this state on whom such service could be made. October 14, 1904, one Nelson, an acting constable, made an affidavit to the effect that the summons and complaint had been delivered to him for service on the defendant; that after diligent search he was unable to find the defendant within the

state, or any agent thereof on whom service could be made; and that the defendant had its principal office in Chicago and received its mail at Hinman and Laflin streets, Chicago. The plaintiff made his affidavit October 17, 1904, to the effect that the summons, a copy of which was attached, had been issued; that the plaintiff's complaint was duly verified and on file with the clerk of the court; that a cause of action existed in favor of the plaintiff and against the defendant; that the defendant was a foreign corporation having property within the state; that the cause of action arose therein; that the court had jurisdiction of the subject of the action, which was to recover the value of goods, wares, and merchandise, as stated; that the defendant's real estate had been attached; that the plaintiff was well acquainted with the defendant, which was a foreign corporation having its principal office in Chicago, and received its mail at the streets named; and that such affidavit was made for the purpose of obtaining an order of publication for the service of the summons on the defendant. Upon the summons and complaint and the record in the action and the said affidavits of Nelson and the plaintiff, an order was obtained from a circuit court commissioner, October 17, 1904, for the service of the summons, thereto annexed, upon the defendant by publication thereof in a weekly newspaper therein named, once in each week for six weeks successively as therein mentioned, and that copies of the summons and complaint be sent to the defendant by mail as therein directed, or, at the plaintiff's option, copies thereof be delivered to the defendant personally without the state, which, when done, should have the same effect as a completed publication and mailing. October 26, 1904, an affidavit was made by one Higgins, a resident of Chicago, to the effect that on October 24, 1904, at Chicago, he personally served the summons and complaint in said action and thereto annexed on the defendant, a corporation, by then and there delivering to H. B. Maxwell, the vice-president and treasurer thereof, and leaving with him, true

copies thereof, and that he knew the said Maxwell so served to be such vice-president and treasurer of such corporation mentioned and described therein; that such affidavits of Nelson and the plaintiff and such order of publication and affidavit of Higgins were not filed in court until November 28, 1904. November 11, 1904, the defendant's attorneys appeared specially and gave notice to the plaintiff's attorney that upon all the records, files, and papers mentioned, and upon the affidavit of one of the defendant's attorneys, stating some of the facts mentioned, and, among other things, that as early as October 23, 1903, the defendant as such foreign corporation fully complied with all the requirements of sec. 1770*b*, Stats. 1898, the court would be moved November 28, 1904, for an order setting aside and vacating such writ of attachment and service thereof and the service of summons and complaint and that the action be dismissed for want of jurisdiction. Upon the hearing of that motion the same was denied by the court November 30, 1904. Upon an affidavit of the plaintiff's attorney of the defendant's default, and that the defendant had not appeared in the cause except specially for such motion, which was denied as stated, the court on December 12, 1904, ordered that the said cause and all issues of law and fact therein be referred to the reporter of the court to hear, try, and determine, and report according to law and the rules and practice of the court, and such reference was therein made compulsory. Thereupon said reporter, after hearing the cause, made findings of fact and conclusions of law as claimed by the plaintiff, and the same were confirmed by order of the court April 10, 1905, and judgment was thereupon ordered in favor of the plaintiff for the amount stated accordingly. From the judgment so entered June 14, 1904, the defendant appeals.

For the appellant there was a brief by *Barry & Barry*, and oral argument by *M. Barry*.

J. W. Hicks, for the respondent.

CASSODAY, C. J. This action is to recover the balance due on the purchase price for goods sold and delivered by the plaintiff to the defendant, a foreign corporation having its principal office in Chicago. The question presented relates to the service of process on the defendant. Our statutes provide that the summons and accompanying complaint may be served upon corporations generally with the same "effect as personal service on natural persons, by delivering" copies thereof to the officers or persons therein named, and also upon such foreign corporations by delivering the same "to any such officer being within the state, or to any agent having charge or of conducting any business therefor in this state, or any trustee or assignee of such corporation, or upon the secretary of state, as provided in sec. 1770*b*. But such service can be made upon a foreign corporation only either when it has property within the state or the cause of action arose therein, or the cause of action exists in favor of a resident of the state, and upon the secretary of state only when the cause of action arises out of business transacted in this state or when the defendant has property therein." Sec. 2637, Stats. 1898. It appears from the record, and is undisputed, that the defendant, as such foreign corporation, had fully complied with the requirements of sec. 1770*b* as early as October 23, 1903. Since it appears from the affidavits and papers upon which the order of publication is based that at the times mentioned in the foregoing statement the defendant was such foreign corporation, having within this state real property which had been attached in this action, and that the cause of action existed in favor of the plaintiff and against the defendant and arose within this state, it is very obvious that the summons and complaint might have been served upon the secretary of state, as prescribed in said sec. 1770*b*. But there is no claim that the summons or the summons and complaint were so served on the secretary of state. On the contrary, the action of the trial court is based upon the order of publication made October 17, 1904,

and the personal service of the summons and complaint on the defendant's vice-president and treasurer in Chicago, October 24, 1904, which, when done, as prescribed in the order of publication, was to "have the same effect as a completed publication and mailing." Of course, such personal service outside the state had no greater or other effect than completed publication and mailing would have had. *Manning v. Heady,* 64 Wis. 630, 25 N. W. 1. In other words, "personal service of the summons and complant outside of the state will not give jurisdiction if no valid order for service was made." *Oelbermann v. Ide,* 93 Wis. 669, 68 N. W. 393; *Roosevelt v. Land & River Co.* 108 Wis. 653, 84 N. W. 157; *Rockman v. Ackerman,* 109 Wis. 639, 85 N. W. 491. The affidavits and papers upon which the order of publication was based certainly fail to show that the summons and complaint could not have been served upon the secretary of state as prescribed in sec. 1770*b,* and subd. 13, sec. 2637, Stats. 1898.

The question recurs whether such affidavit and papers stated facts sufficient to authorize such order of publication. The statute declares that:

"Service of the summons may be made without the state or by publication upon a defendant against whom a cause of action appears to exist . . . on obtaining an order therefor as provided in the next following section, in either of the following cases: (1) When such defendant is a nonresident of this state or his residence is unknown, or is a foreign corporation, and the defendant has property within the state, or the cause of action arose therein, and the court has jurisdiction of the subject of the action, whether the action be founded on contract or tort." Sec. 2639.

"The next following section," therein mentioned, declares that:

"The order mentioned in the preceding section shall be made by the court or judge thereof. The application therefor shall be based upon the complaint, duly verified and filed, and an affidavit, together showing the *facts required to exist and*

that the plaintiff is unable, with due diligence, to make service of the summons upon the defendant in respect to whom such order is applied for." Sec. 2640.

This section requires that the application for such order must show "the facts required to exist and that the plaintiff is unable, with due diligence, to make service of the summons upon the defendant in respect to whom such order is applied for." This court has held that "such facts must be shown to exist at the time the order is made." *Roosevelt v. Land & River Co.* 108 Wis. 653, 658, 84 N. W. 157. The extent of the showing made on such application in the case at bar is "that the summons and complaint herein were delivered to" the constable "for service on said defendant, and that after diligent search he" was "unable to find the defendant within the state or any agent thereof on whom service" could "be made." Such showing did not satisfy the requirements of the statutes quoted. A valid order of publication was essential to the validity of the judgment against the defendant. *Frisk v. Reigelman,* 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766; *Beaupre v. Brigham,* 79 Wis. 436, 48 N. W. 596. There is no presumption of the existence of facts essential to give jurisdiction in such a case. *Roosevelt v. Land & River Co., supra.* The trial court should have granted the application of the defendant and dismissed the action for want of jurisdiction.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to dismiss the action.

E. M. FISH COMPANY, Appellant, vs. YOUNG and others, Respondents.
SAME, Respondent, vs. SAME, Appellants.

January 12—January 30, 1906.

Appeal and error: Findings when disturbed: Mechanics' liens: Fixtures: Window screens: "Appurtenances:" Pleading: Defense in abatement: Waiver: Costs: Taxation: Findings: "Necessary papers."

1. Where the conclusion reached by the trial court is not against the weight of the evidence the judgment will be affirmed.
2. Physical annexation, although always an important consideration, is not the sole or controlling test in determining the question of fixture or no fixture. The question of the intention of the party making the annexation is the principal consideration.
3. Where the owner of a house orders window screens to be manufactured and fitted to his house, though detachable for convenience during the winter months, the intention is unquestionably to permanently increase the comfort of the house and its desirability for residence purposes, and, under subd. 1, sec. 3314, Stats. 1898 (giving a lien for material and labor furnished for or in or about the erection, construction, or repair of any dwelling house, building, or appurtenance), such screens are clearly included within the term "appurtenance."
4. A defense of another action pending is a defense in abatement, which must be pleaded with particularity, and if not pleaded is waived.
5. Findings which upon vital points fail to conform to the direction and decision of the trial court are not "necessary" papers or proceedings in a cause, and charges therefor in a bill of costs presented for taxation should be entirely disallowed.

APPEALS from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Modified and affirmed.*

For the plaintiff there were briefs by *Wickham & Farr,* and oral argument by *F. R. Farr.*

For the defendants the cause was submitted on the briefs of *Bundy & Wilcox.*

WINSLOW, J. This is an action to foreclose a mechanic's lien for repairing and rebuilding a dwelling house. The court adjudged a lien for $39.50, with interest and costs, and both parties appeal.

Upon the plaintiff's appeal the contention is that the judgment should have been entered for $175.69, and this question will first be considered. It appears that prior to January 14, 1902, the defendant *Young's* house had been partially destroyed by fire and that *Young* made an oral agreement with the plaintiff to make the necessary repairs as cheap as any other contractor, the defendant to furnish such material as he could. Under this arrangement the plaintiff went to work about the 14th of January, 1902, and ceased to work March 22d following. *Young* made payments on the account from time to time, among which payments was a carload of lumber, which was credited to him by plaintiff April 19, 1902, at $157.19, but which afterwards turned out to be not the property of *Young*. On May 16th following the parties met and *Young* turned over to plaintiff a due bill for $22.69, payable in lumber, and sufficient cash to amount to $75 in all, and the plaintiff gave him a receipt "to balance account to date." Shortly after this transaction *Young* ordered of the plaintiff screens for the windows and doors of the house, and the plaintiff manufactured them and placed them upon the windows and doors of the house May 31st, attaching them with buttons, and also repaired some old screens for the house; the total value of labor and materials in connection with the screens being $39.50, and the work being finished June 7th. This action was commenced May 30, 1903. The plaintiff claims that the furnishing of the screens was a part of the original contract, and, as it was afterwards obliged to pay the true owner of the carload of lumber therefor, it sought to enforce a lien in this action for the amount which it was obliged to pay the true owner for the carload of lumber and for the bill for screens as for a single continuous bill. The

court found, however, that the original contract of repairing was completed March 22, 1902, and that the contract for the screens was a separate and independent contract. Such being the finding, and this action not having been commenced until May 30th in the following year, the court held that there could be no lien for the work on the original contract because the action was not commenced within one year from the last charge for the performance of work (Stats. 1898, sec. 3318), and only adjudged a lien for the furnishing of the screens. This was purely a question of fact upon the evidence. We cannot say that the conclusion reached by the court is against the weight of the evidence, and hence the plaintiff's contention must fail.

Upon the defendant's appeal three contentions are made, which will be briefly considered.

1. It is claimed that the window and door screens were not so attached to the house as to become fixtures, and hence that no lien upon the house can be adjudged for them. This contention cannot prevail. The screens were manufactured specially for and fitted to the house, were adapted to its permanent enjoyment and placed there by the owner. It is true that (according to the findings) they were not physically attached or screwed on, but were simply fastened by buttons (although it is not quite clear how doors could be so attached and serve any useful purpose). Physical annexation, however, although always an important consideration, is not the sole test nor by any means the controlling test in determining the question of fixture or no fixture. The question of the intention of the party making the annexation is the principal consideration. *Rinzel v. Stumpf,* 116 Wis. 287, 93 N. W. 36. When the owner of a house orders screens to be manufactured and fitted to his house there can be no serious doubt as to his intention. Though detachable for convenience during the winter months, the intention is unquestionably to permanently increase the comfort of the house and its desira-

bility for residence purposes. The great majority of houses now built are provided with detachable fly screens manufactured for and specially fitted to the house by the owner and intended to be used thereon during the summer season, and it would be a strange doctrine which should hold that when such a house is sold the screens do not pass with the house as a part of the realty, but may be taken away by the vendor unless specially transferred to the vendee. Our statute gives a lien for materials and labor furnished "for or in or about the erection, construction, repair . . . of any dwelling house, building or appurtenance thereto" (Stats. 1898, sec. 3314, subd. 1), and we think that screens manufactured for and fitted to the house as in the case at bar are part of the house and clearly included within the term "appurtenance," although they are detachable without injury to the house.

2. It appeared that another lien action was commenced shortly before the present action, and the claim is made that this action should have been dismissed because there was another action pending to which the plaintiff should, by application to the court, have become a party, for the reason that it is the legislative intent that but one action should be maintained for the foreclosure of mechanics' liens upon the same property in which all the lien claimants should litigate and enforce their claims. Stats. 1898, sec. 3321. Were the question really here for decision it would deserve serious consideration, but the difficulty is that this defense was not pleaded. The defense of another action pending is a defense in abatement, which must be pleaded with particularity, and if not pleaded it is waived. *Winner v. Kuehn,* 97 Wis. 394, 72 N. W. 227.

3. The trial court filed a short opinion in deciding the case, and directed the plaintiff's attorneys to draw findings. Thereupon the attorneys drew findings which were signed by the judge, but which did not accord with the decision in two vital points, and did not sustain the judgment for that reason.

Thereafter, upon motion of the defendants' attorney, the findings were corrected so as to accord with the decision of the court. The plaintiff was allowed to recover costs for drawing these findings, and error is now claimed upon this ruling. It has been decided that a party may tax for the drawing of findings when directed so to do by the trial judge. *Hill v. Durand,* 58 Wis. 160, 15 N. W. 390. While the practice is allowable it is not commendable, and the present case amply illustrates the danger. The statute requires the decision to be in writing in an action tried by the court, and directs that "the judge shall state in his decision separately (1) the facts found by him and (2) his conclusions of law thereon." Thus the responsibility for the correctness of the findings is thrown upon the judge, and he cannot shirk it. *Harrigan v. Gilchrist,* 121 Wis. 127, 396, 99 N. W. 909. If he does not draw them himself (and no good reason is perceived why he should not do so, except in case of a press of judicial business which deprives him of the necessary time), he should clearly inform counsel of the conclusions of fact and law which he has reached and should carefully examine the findings to see if they agree with such conclusions before signing them. On the other hand, the attorney who is directed to draw the findings should see to it that they are drawn precisely as directed. Any other course will naturally result in partisan and inaccurate findings not representing the real decision and perhaps not sustaining the judgment. That was the case here, and the question is whether costs should be allowed for the drawing of such findings. This question must be answered in the negative. Findings which upon vital points fail to conform to the direction and decision of the trial court are not "necessary" papers or proceedings in a cause; on the contrary, they are, in the highest degree, unnecessary and improper. The charge allowed for drawing the findings and copies in this case was $14.70, and it should have been entirely disallowed.

Upon the defendants' appeal the judgment must be modi-

fied so as to allow only $103.56 costs, and, as so modified, the judgment must be affirmed on both appeals: no costs to be recovered by either party, except that the fees of the clerk of this court shall be taxed against the plaintiff.

By the Court.—It is so ordered.

EAU CLAIRE WATER COMPANY, Appellant, vs. CITY OF EAU CLAIRE and another, Respondents.

January 12—January 30, 1906.

Waterworks: Acquisition by city: Cloud on title: Expenses: Arbitration: Indemnity: Temporary injunction.

1. Where a city, pursuant to the terms of a franchise under which a corporation was operating a system of waterworks therein permitting it to acquire the waterworks plant on payment of its value as determined by arbitration, had instituted proceedings for arbitration, the proceedings are simply an assertion of a right claimed under the franchise, which, if legal, is as effectual and as valid a claim before the arbitration as subsequent thereto.
2. Such arbitration does not create a cloud on the water company's title and thereby invade its right to the enjoyment of its property.
3. While such arbitration would compel the water company to participate in the proceedings to bring about a correct valuation and require it to devote time and attention to the accomplishment of such a result, yet the annoyance incident to the determination of the rights of the parties under the franchise in no sense causes irreparable injury, nor is it a ground for equitable relief by injunction.
4. While the water company may incur expense in connection with such arbitration, it is necessarily such as can be readily measured by a pecuniary standard and adequately compensated, and hence furnishes no ground for a temporary injunction.
5. In such case, however, the city should be restrained from proceeding with the arbitration unless it gives an undertaking with sufficient sureties, in a sum specified by the court, to indemnify the water company for the payment of all reasonable expenses incurred by it in such arbitration.

APPEAL from an order of the circuit court for Eau Claire county: E. W. HELMS, Judge. *Reversed.*

This is an appeal by the plaintiff from an order of the circuit court denying its application for an order to restrain defendant, *pendente lite,* from proceeding to appoint appraisers to determine the value of plaintiff's waterworks plant. This action is brought to restrain defendant from proceeding with an arbitration to determine the value of plaintiff's waterworks plant, pursuant to the terms of a franchise under which the plant was constructed and is being operated by the plaintiff. This franchise provides that the city of *Eau Claire* may acquire the plant by payment of its value, which is to be determined by five appraisers, two of whom are to be selected by the city, two by the plaintiff, and the fifth by the four persons thus chosen; in case of their failure to appoint the fifth, he is to be appointed by the judge of the Eau Claire county circuit court. It is alleged that on August 4, 1905, the defendant took the initial steps for acquiring the waterworks plant under the franchise by giving notice to the plaintiff to that effect and by demanding that appraisers be selected to determine its value; that on September 5, 1905, plaintiff and defendant each appointed two arbitrators; that they failed to select the fifth within the time prescribed in the franchise; and that thereupon on September 26, 1905, the defendant served notice upon the plaintiff of an application for his appointment by the circuit judge of the proper county. The complaint also alleges that proceedings were had under the provisions of the franchise in 1900, wherein, plaintiff claims, the defendant either exhausted its rights to purchase or waived them by a settlement of the proceeding; that the city, in no event, can purchase because it has no funds in possession available for that purpose; and that it cannot legally incur any obligations to secure the necessary funds in view of the existing municipal indebtedness; and the complaint, therefore, claims that the city has no right or power to acquire the

waterworks plant under the franchise, and prays that the city be perpetually restrained from further prosecuting the proceeding for the appointment of appraisers, or from taking, as it threatens to do, any other steps to acquire the waterworks plant. The city has entered a general demurrer to this complaint. Plaintiff obtained an order in the action requiring defendant to show cause why it should not be restrained, during the pendency of this action, from proceeding with the arbitration. By the same order all proceedings were restrained until such application was heard. Upon the hearing of this application for a preliminary injunction the city caused the affidavit of James Wickham, its city attorney, to be filed in opposition, and after a hearing the court made an order denying the application and vacating that part of the order which restrained further proceedings up to the time of such hearing. Thereupon plaintiff, under sec. 3061, Stats. 1898, made application to the circuit court for a continuance, during the pendency of an appeal to this court from this order denying the preliminary injunction, of that part of the order temporarily restraining defendant, and for an order fixing the amount of the undertaking it should give on such application. Under this application the court ordered that the amount of the undertaking be in the sum of $10,000, and that, upon the giving of such undertaking, the temporary restraining order theretofore made, restraining proceedings during the pendency of the application for a preliminary injunctional order, be continued in force until the action should be determined, unless defendant, at some time during the pendency of the appeal, should give an undertaking in the prescribed form and manner in the sum of $5,000 to perform and abide by any final judgment rendered in plaintiff's favor, and in case defendant should so give this undertaking, then the order restraining proceedings during the pendency of the appeal should thereafter cease to be effective. The defendant thereafter gave the undertaking in the sum of $5,000 as pre-

scribed. After the appeal was perfected plaintiff obtained an order from this court restraining defendant from taking any further steps in the arbitration proceedings during the pendency of this appeal.

For the appellant there was a brief by *W. F. Bailey,* attorney, and *Winkler, Flanders, Smith, Bottum & Fawcett,* of counsel, and a separate brief signed also by *F. C. Winkler,* of counsel, and oral argument by *Mr. Winkler* and *Mr. Bailey.*

James Wickham, for the respondents.

SIEBECKER, J. The grounds presented for reversal of the order of the court, which denies plaintiff's application for a temporary injunction, are, that if defendant be permitted to proceed with the arbitration under the right alleged to be under and pursuant to the franchise it will create a cloud upon plaintiff's title to the waterworks plant, and compel plaintiff to incur great and unnecessary expense in connection with such proceedings during the pendency of the action, and subject it to great annoyance and vexation in such proceedings and in the management and enjoyment of its property, and also subject it to a multiplicity of actions. Appellant's counsel frankly meet the question and concede that the trial court's refusal to grant the relief asked for cannot be attacked unless the record discloses "a reasonable probability of plaintiff's ultimate success," and that the refusal to grant the injunction "will render futile, in considerable degree, the judgment sought, or cause serious and irreparable injury to [the] party." *De Pauw v. Oxley,* 122 Wis. 656, 659, 100 N. W. 1028. The question is therefore presented: Will plaintiff suffer serious and irreparable injury, or, in the event of its final success in the action, will any judgment it seeks become fruitless in material and substantial respects, if the defendant should proceed with the arbitration as it threatens to do unless restrained by the court? We will consider the questions upon the assumption that the complaint states facts sufficient

to constitute a cause of action, though we do not pass opinion on this question and reserve it as undetermined.

It is contended that the prosecution to completion of the arbitration for the valuation of the waterworks plant will create a cloud upon plaintiff's title and thereby invade plaintiff's right to the enjoyment of this property. We are unable to perceive in what respect the arbitration can so affect plaintiff, and no particulars are suggested whereby the arbitration can substantially interfere with its rights and its enjoyment of the property and make them materially different from anything that existed before the arbitration was instituted. No right other than such as theretofore existed is asserted or claimed. The proceeding is simply an assertion of a right claimed by the defendant under the contract, and, if legal, this was as effectual and as valid a claim before the arbitration as subsequent thereto.

Again, it is claimed that if the arbitration be proceeded with the plaintiff will be subjected to great annoyance and vexation in the proceeding and in the management and enjoyment of the plant. We are again led to inquire whether there is any substantial ground of complaint alleged here. It may be true that an appraisement will compel plaintiff to participate in the proceedings to bring about a correct valuation, and require that it devote time and attention to the accomplishment of such a result, yet such an imposition cannot be regarded as an annoyance and vexation to plaintiff's legal rights for which it has no redress because of irreparable injury. The annoyance incident to the determination of the rights of the parties under the franchise is in no sense regarded as a ground for the equitable relief sought.

It is furthermore claimed that, if defendant actually proceeds with the arbitration, then plaintiff will necessarily be compelled to incur great expense in connection therewith. This claim is undoubtedly well founded, but we are unable to find in it a justifiable ground for this equitable relief. Unless it appears that the imposition of such expense will do

irreparable injury, defendant cannot be restrained from taking necessary steps to enforce an allèged right under an admitted contract simply because its acts will impose expense on the plaintiff. As this court has declared:

"An injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard." *Wilson v. Mineral Point,* 39 Wis. 160.

Whatever damages may be incurred by way of expense and services in connection with the arbitration can readily be measured by a pecuniary standard and adequately compensated. We discover no ground that entitles plaintiff to the temporary injunction.

Should defendant elect to proceed with the arbitration during the pendency of this action, it seems just and appropriate that defendant should be required to secure the payment of any bill of expense which plaintiff, should it finally succeed in this action, may reasonably incur in connection with the arbitration proceeding. To accomplish this, the circuit court should grant an order restraining defendant from proceeding with the arbitration unless the defendant, at some time during the pendency of the action, give an undertaking with sufficient sureties, in a sum specified by the court, to indemnify plaintiff for the payment of all reasonable expenses incurred by it in such arbitration, and upon the giving of such undertaking by the defendant the temporary order should be deemed vacated and no longer effective for any purpose. As to the amount of such an undertaking, we are of the opinion that $5,000 would be reasonable.

We must therefore reverse the order appealed from and direct that the court grant an order as above indicated. The restraining order of this court will continue in force until the circuit court enters the order as herein directed.

By the Court.—It is so ordered.

SCHWANTES, Plaintiff in error, vs. THE STATE, Defendant in error.

January 13—January 30, 1906.

(1) *Jurors: Qualifications: Aliens: Exceptions: Waiver.* (2–6) Corpus delicti: *Circumstantial evidence, sufficiency, competency, and weight.* (6, 7) *Reasonable doubt.* (8–12) *Witnesses: Cross-examination: Impeachment: Competency.* (13–16) *Opinion evidence.* (17, 18) *Homicide.* (6, 7, 19, 20) *Instructions to jury.*

Frank Schwantes, aged about thirty-two years at the time of the principal event here mentioned, and William Klokow and wife, then about sixty-five years of age, were close acquaintances for over eighteen years. After residing for five years prior to such event about three quarters of a mile apart on farms, they made a contract whereby the Klokows conveyed their belongings to *Schwantes*, reserving a home on their farm, and the latter agreed to furnish them certain specified amounts of money and other articles annually for their support and care in case of sickness, securing the obligation on his farm and the one thus obtained. The arrangement soon became so intolerable that all determined to avoid it in some manner. They negotiated to that end upon the basis of a sale by the Klokows, to a point of substantial agreement. In the morning of the day *Schwantes* purposed making preparation to pay the Klokows, he was notified that they would not trade as expected. Thereafter during such day he spent the greater part of his time in making visits to the home of the Klokows and removing property therefrom to their annoyance. On his last visit they were not found at home, giving rise to the belief that they had gone to put into execution a previous threat to foreclose their mortgage. Thereafter about dark they were at home and in their usual state of health. They were not accustomed to be away from home nights. Before morning the house was destroyed by fire and they disappeared. Suspicion pointed to *Schwantes* as the cause. His conduct soon changed suspicion to belief. An investigation of the remains of the fire developed the presence therein of portions of one or more human bodies. Such proceedings were then had that in due course *Schwantes* was convicted of having murdered the Klokows, the evidence being wholly circumstantial.

1. If an alien serves on a jury without objection being seasonably made and insisted upon, his incompetency is thereby waived whether the case is civil or criminal.

2. The elements of *corpus delicti* may be established by circumstantial the same as by direct evidence.
3. Evidentiary circumstances relied upon and essential to establish any necessary element in a criminal prosecution must, in order to be efficient, be shown to exist to the satisfaction of the jury with the same degree of certainty as the ultimate object of inquiry is required to be to warrant a finding in the affirmative.
4. Whether any particular evidentiary circumstance claimed to exist tends, in any reasonable view, to prove any element essential to the success of a criminal prosecution, is a matter to be decided by the court on the *voir dire* and its conclusion cannot be disturbed, unless shown to be clearly wrong.
5. The weight of evidentiary circumstances is wholly for the jury. If, in their judgment, they point to the existence of the main object of search so strongly as to establish its existence to a moral certainty, they should find accordingly the same as in case of belief to a like degree of certainty produced by direct evidence.
6. In a criminal prosecution the jury may be instructed that they should acquit the accused, unless the evidence in their judgment so strongly establishes his guilt as to exclude every reasonable theory based thereon of innocence. The instruction applies as well to direct as to circumstantial evidence, and should not be given in a way to suggest infirmity as regards the latter.
7. If the evidence in a criminal prosecution is susceptible of producing belief of guilt beyond every reasonable doubt, and they find accordingly, their decision cannot be successfully challenged because in the judgment of others the evidence is only susceptible of producing belief of guilt to a less and insufficient degree of certainty.
8. Cross-examination of a party for the purpose of discrediting his evidence is governed by the same rules as that of any other witness.
9. Matters utterly irrelevant cannot be inquired into on cross-examination, even for the purposes of impeachment.
10. Questions on cross-examination are not relevant for the purposes of impeachment, unless it would be competent to prove the existence of the circumstance suggested by the questions otherwise, upon a proper foundation being laid therefor, where one is required.
11. Questions on cross-examination in regard to merely imaginary circumstances with no reasonable ground to expect favorable answers, or to be able to impeach the answers, are improper, and when permitted against objection to an extent liable to

prejudice the jury as to the truth of the matter in hand, it is harmful error.

12. Where the wife of a party acts as his agent in respect to any matter material to be established in a judicial proceeding, either respecting the particular subject of inquiry or a mere evidentiary fact in respect thereto, she is a competent witness for her husband as to everything done by her within the scope of such agency.

13. The scope of opinion evidence is not limited by the technical meaning of the term "science, art, or skill." It extends to and includes every subject in respect to which one may acquire special knowledge.

14. The preliminary questions respecting opinion evidence, *i. e.* that of the competency of the witness and that of whether the subject is within the scope of opinion evidence, are in the field of competency, in which the judgment of the trial court is conclusive, unless shown to be clearly wrong.

15. Opinion evidence as to a matter of common knowledge is not permissible, though not necessarily prejudicial.

16. A person of mature years may, regardless of whether he took note of the matter by a clock or watch, testify from his best judgment as to the time of day of any particular circumstance happening under his observation, or the time occupied by the occurrence.

17. In case of a prosecution for criminal homicide where the body of the victim was destroyed, it is not necessary to a conviction to establish beyond a reasonable doubt the precise means by which death was produced.

18. In respect to whether death was produced by criminal means it is proper to instruct the jury that they are permitted to consider any cause other than that charged, which may in any reasonable probability have acted in the matter, such as suicide or accident, or the act of some person other than the accused.

19. A trial court is permitted to instruct the jury as to a particular matter, calling attention to part of the evidence on each side in respect thereto, not giving undue prominence to any thereof, and coupling the same with an admonition that the particular evidence referred to, and all other evidence bearing on the question, should be considered.

20. The trial court in a criminal prosecution may by appropriate language admonish the jury to proceed to the discharge of their duty bearing in mind the importance of the result to the public and the accused as well.

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the circuit court for Marathon county: JAMES O'NEILL, Judge. *Affirmed.*

On the 11th day of November, 1901, during such term the plaintiff in error, in due form of law, was adjudged guilty of murder in the first degree,—in that on the 14th day of November, 1900, at such county, with malice aforethought he took the life of William Klokow and Ernestina Klokow, his wife,—and was in due form sentenced to be punished by confinement at hard labor in the state prison at Waupun, Wisconsin, during his natural life. Subsequently a writ of error was sued out of this court for a removal of the cause to this jurisdiction for review as to alleged errors duly preserved for that purpose. The history of the case will be given in the opinion.

For the plaintiff in error the cause was submitted on the brief of *Bump, Marchetti & Bump,* attorneys, and *Franklin E. Bump,* of counsel. They contended, *inter alia,* that being a capital case it was not competent for the defendant's counsel to waive the fact that one of the jurors was not a citizen, and it was error for the court to deny defendant's motion for a new trial because of the alienage of said juror. *State v. Vogel,* 22 Wis. 471; *Shumaker v. State,* 5 Wis. 324. If a defendant in a capital case can waive the absolute disqualification of alienage, he can waive trial by jury entirely. This he is not permitted to do, after a plea of not guilty, in the absence of an express statute. *State v. Lockwood,* 43 Wis. 403; *In re Staff,* 63 Wis. 285; *Mays v. Comm.* 11 Va. L. J. 88; *State v. Worden,* 46 Conn. 349; *Cancemi v. People,* 18 N. Y. 128, 136; *Morgan v. People,* 136 Ill. 161, 26 N. E. 651; *Harris v. People,* 128 Ill. 585, 21 N. E. 563; *King v. State,* 87 Tenn. 304, 3 L. R. A. 210, 211, n.; *Gore v. State,* 52 Ark. 285, 5 L. R. A. 832, 836, n.; *Brown v. People,* 20 Colo. 161, 36 Pac. 1040.

For the defendant in error there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and

Neal Brown, of counsel, and oral argument by *Mr. Brown* and *Mr. Titus.* They contended, *inter alia,* that the objection of the defendant to the jury was not well taken and that whatever irregularities there might be could be waived as in other cases. *In re Roszcynialla,* 99 Wis. 534; *Rowan v. State,* 30 Wis. 129; *Bonneville v. State,* 53 Wis. 680; *Williams v. State,* 61 Wis. 281, 292; *Miller v. State,* 25 Wis. 384; *Reynolds v. U. S.* 98 U. S. 145; *Stewart v. State,* 15 Ohio St. 155; *Kingen v. State,* 46 Ind. 132; *Croy v. State,* 32 Ind. 384; *People v. Webb,* 38 Cal. 467; *State v. Glass,* 50 Wis. 218; *Dickerson v. State,* 48 Wis. 288; *People v. Kelley,* 47 Cal. 125; *People v. Gibbons,* 43 Cal. 557; *State v. Wentworth,* 65 Me. 234; *State v. Polsen,* 29 Iowa, 133; *Sarah v. State,* 28 Ga. 576; *Emery v. State,* 101 Wis. 627, 645. The *corpus delicti* might be established by circumstantial evidence. *Stocking v. State,* 7 Ind. 326; *State v. Williams,* 7 Jones (N. C.) 446; *McCullock v. State,* 48 Ind. 109; *Comm. v. Webster,* 5 Cush. 295; *State v. Dickson,* 78 Mo. 438; *Smith v. Comm.* 21 Gratt. 809; *Ruloff v. People,* 18 N. Y. 179; *State v. Brown,* 1 Mo. App. 86; *U. S. v. Williams,* 1 Cliff. 5; *State v. German,* 54 Mo. 526, 530; *Wilson v. State,* 43 Tex. 472. Circumstantial evidence need not exclude every possibility of defendant's innocence. *Findlay v. State,* 5 Blackf. 576, 36 Am. Dec. 557; *Sumner v. State,* 5 Blackf. 579, 36 Am. Dec. 561; *Comm. v. Goodwin,* 14 Gray, 55, 57; *People v. Williams,* 32 Cal. 280, 283; *People v. Lambert,* 5 Mich. 349, 367; *Martin v. State* (S. C.) 25 S. E. 113; *Comm. v. Johnson,* 162 Pa. St. 63, 29 Atl. 280; *State v. Smith,* 9 Wash. 391, 37 Pac. 491.

MARSHALL, J. The following circumstances appear conclusively from the record without controversy, or there is evidence tending to establish the same: William Klokow and Ernestina Klokow were foreign born. They were Germans of humble degree. They settled on the northeast quarter of

the northeast quarter of section 3, town 26, range 2 east, in Marathon county, Wisconsin, about the year 1883, and there resided until the 14th day of November, 1900. The last seen of them while living, so far as known, was on the evening of that day. Their remains were subsequently discovered as hereinafter indicated. They made improvements on their land, fitting the same for a moderately comfortable country homestead for humble people of their class. They lived alone and rarely went away from their farm. Their uniform custom was to be at home nights, and to retire early after dark. For a considerable period of time prior to the day named, the buildings on the place consisted of a log house, a barn of considerable size located a short distance northwesterly thereof, a small horse barn, a fair-sized barn for small stock, a granary and wagon shed, and one or two other small structures, all the outbuildings being located at convenient distances from the house and in westerly ranges therefrom. The house faced the east with the front part about 103 feet from the highway on the east line of the forty. The body of the house was sixteen by twenty feet. It was constructed of hewed logs to the height of about twelve feet, made tight at the points of union between the logs with clay mud. The roof and gables of the house were of boards and shingles and timber supports. The cellar was curbed with logs. On the back part of the house there was a lean-to made of lumber, used for a summer kitchen during a portion of the year, and otherwise as a woodshed and storehouse. The house was whitewashed inside and out and there was considerable clay mud used in its construction inside, particularly in the ceiling. In the northeast corner there was a small bedroom used by the Klokows for their sleeping apartments. In the northwest corner there was a small pantry. The attic part of the house was reached from the inside by a ladder. There was a front door about midway on the front side of the house and a window on each side, one opening into the bedroom and the other into the living room.

There was a back door opening into the woodshed and one from the woodshed to the outdoors. There was a window on the north side of the house opening from the pantry, and one at the south side opening into the living room, and one on the back part of the shed. There was a cook stove located a few feet southeasterly of the door opening into the bedroom and about midway of the house east and west and in a line with the front door. There was a box stove used as a heater towards the southerly side of the house and in a line with the cook stove, the pipe from the heater being connected with the pipe from the cook stove, thence into the chimney. Both stoves were customarily used at the time of year of the occurrence in question. The box stove was somewhat imperfect. The door would not stay closed securely by the ordinary fastenings. A brace was used to remedy that. The door had been known to unexpectedly come open and allow coals of fire to escape to the floor. The bed in which the old people slept was so located that one standing outside of the house at the window could readily see the occupants, if there were such and the window was not curtained. Mrs. Klokow at the time of her disappearance was about sixty-four and her husband about sixty-five years of age. She was in fairly good health for one of her years and able to perform pretty hard work indoors and out, which she customarily did. He, some years before his disappearance, had a stroke of apoplexy of a serious character from which he did not thereafter wholly recover. It affected his bodily strength and impaired him mentally. East of the Klokow place in a direct line a little over three quarters of a mile, for some five years before the disappearance, the accused resided. The distance between the two places by way of the highway was about one mile and a quarter. The route of travel lay north from the home of the accused nearly a quarter of a mile, thence west three quarters of a mile, thence south about fifty-two rods. There was little or no travel along this road from the direction of the

home of the accused, except by himself and family and such persons as had occasion to go to or from his place. The road was not extended east of his home. Small brush and trees to some extent obscured the view of the Klokow buildings from the home of the accused, though they could be seen therefrom. A little northwest of the Klokow home, about 1,057 feet therefrom, and on the north side of the highway which lay on the north side of the Klokow land, was the home of August Schwantes. That was about thirty-two rods from where the road turned east going from the Klokows toward the home of the accused. The home of August Schwantes was so located that the end of the Klokow house was visible therefrom, the rest of the house being obscured by Klokow's large barn. West of the former's home and on the same side of the road, about half a mile in a direct line from the Klokow place, was the home of Fred Schwantes. Further west at a point about three quarters of a mile from the Klokow place and in a direct line therefrom about 700 feet north of a direct line east was located the home of J. A. Butters. Still further west, about one quarter of a mile, were the homes of H. Schwantes, F. Korth, and one Schilling. There were homes of some other settlers within easy reach of the Klokow place and that of the accused. The lay of the country between the Klokow place and the others mentioned was uniformly level, and where not cultivated it was wooded with a light growth of brush and small timber. The conditions were such that from the August Schwantes place, as before indicated, the Klokow place was in plain sight. It could also be quite plainly seen from the Butters place and from Korth's place.

To summarize the physical situation above indicated, one standing at the Klokow place looking directly east, the line of sight being partly obstructed by small brush and trees, would have the home of the accused in view at a distance away of three quarters of a mile. Turning so as to look northwesterly and along the east end of the Klokow large barn, one would

have the August Schwantes place in sight a little over 1,000 feet distant. Turning further to the west so as to look nearly in a direct line northwest, the home of Fred Schwantes, located nearly one-half mile away, the line of sight being interrupted somewhat by small brush and timber, could be seen. Turning still further to the left, the line of sight would intercept the home of H. Schwantes one mile distant. Continuing the turn to the left so as to look nearly west, the line of sight would then be interrupted by the home of J. A. Butters, which could be seen over the tops of small trees. About three quarters of a mile further on in a direct line to a distance of about one mile from the point of sight the Schilling place was located. Further turning to the left so as to look directly west, the line of sight would be cut at a point about one mile from the point of observation by the Korth home, from which over the tops of small trees the Klokow place could be seen. Within the ranges mentioned there was located the home of Charles Cramer, one and one-half miles distant, and some others. The accused at the time of the disappearance mentioned was thirty years of age. He had been married several years. His family consisted of a wife and three children. His acquaintance with the Klokows covered the entire period of their residence in Marathon county. He had been for several years one of their most intimate neighbors. They visited back and forth frequently and exchanged work. Sometime prior to the 15th day of September, 1900, it occurred to Mr. Klokow, by reason of his declining years and infirmities, that it was best to use his property so as to provide for the keep of himself and wife during the rest of their days without his continuing to work the farm. He then had the forty acres mentioned with the improvements thereon, the crops produced or growing for the season of 1900, consisting of hay and grain, a fair supply of farm machinery, a span of horses, and some cattle, hogs, and sheep. He discussed the subject of the disposition of his property with the accused on several occasions,

the mutual intentions being that the latter should in some way acquire the place, if a satisfactory agreement could be reached and thereby the old people be provided for. During all of the negotiations leading up to the final conclusion the Klokows were not advised by any one, save the accused. The first talk related to a sale of the place outright. Negotiations to that end covered quite a period of time, during which the accused declined to give the Klokows the consideration they sought to obtain. The property was incumbered by $250 as to the realty and a small sum as to the personalty. An agreement was finally reached between the parties, in a general way, for the accused to take over the property, the Klokows reserving the right to a home thereon during the residue of their lives, and the accused agreed to render to them each year certain moneys, groceries, and other articles for their support. Whereupon the accused and his wife and the Klokows visited the office of Mr. Edw. J. Hahn, in Marshfield, Wisconsin, for the purpose of settling the details of their arrangement and having the same executed in writing. The matter was not concluded on the first visit, but on one made the succeeding day all of the Klokow property by appropriate conveyance was transferred to the accused. An agreement was entered into securing to the Klokows the use of the dwelling house during their natural lives and one acre of land in connection therewith, some stable accommodations, and each year a stipulated amount of money, provisions, and other articles for their support, and certain care, specified, in case of sickness. A bond was entered into by the accused to secure the performance of his agreement and all was secured by a mortgage upon the real estate conveyed and upon the farm owned by him. Very soon after this transaction the relations between the parties began to be unpleasant. The women were active participants in the trouble. The matter became a subject of neighborhood talk, which displeased the accused. His conduct toward the old people, from their standpoint,

was unreasonably harsh and wrongful. It greatly irritated them. They claimed that he did not provide for them as agreed. On his part he claimed that he lived up to his agreement to the letter. He removed the hay from the place and took away the horses and otherwise exercised dominion over the property to the mental disturbance of the old people. They had no way of going from home to church or otherwise, except on foot, which they were not accustomed to do. To remedy the matter they were compelled, as they supposed, to earn money to obtain a horse. By about sixty days after the making of the contract the relations between the parties became very hostile. There were frequent disputes and quarrels, stopping short of physical violence, in which the women took an active part, resulting in the Klokows, on one side, determining to recover back the property or to obtain relief in some way by a foreclosure of his mortgage, and to the knowledge of the accused, and the latter determined, if he could, to buy out their interests for a money consideration and end the trouble in that way. He negotiated with them to that end, resulting in a partial agreement as he supposed, and he took some steps to obtain the money which might be required. In the early days of November after the contract was made he visited an insurance agent, who prior to the contract insured the buildings for Mr. Klokow, expressing a desire to have the insurance duly transferred, and the amount increased. He had the policy with him at that time and his attention was called to the fact that it had not been assigned by Klokow. On the 12th or 13th day of November thereafter the agent received the policy from the accused by mail with the blank assignment printed thereon signed by the name of William Klokow. That was accompanied by a request on the part of the accused to increase the insurance $275 on the hay and some farm machinery. The accused visited the Klokow place on the 14th day of November, 1900. He was on his way to complete negotiations in regard to obtaining money to buy the

old people out. It was in the morning. He saw Mr. Klokow and was informed that there was no use of obtaining the money for Mrs. Klokow had made up her mind that she would not sell. He returned home and later went back, his wife accompanying him, at which time they drove the sheep away, the Klokows protesting. During the first trip there was talk about his delivering to the Klokows some flour. He neglected to take the flour to them on the second trip. He made a third trip in the afternoon, at which time he took the old people the flour. He was unable to enter the house, as he claimed, finding both doors locked and not being able to obtain any response from the signals of his presence. He thereupon, as he claimed, put the flour in the granary. He then loaded up some lumber which he knew the Klokows did not wish to have him remove, and took the same to his place. The Klokows were as well as usual that day. After the time of the last visit aforesaid, and in the edge of the evening, they were at home. Sometime during the night following the house was wholly consumed by fire. The last seen of the old people alive was as aforesaid. No one was present during the progress of the conflagration, except the accused. It was not observed by any one, so far as appears, except him until after midnight, when it was seen from the Butters place. About half-past 5 in the morning the house was discovered to have been burned, by near neighbors. It was then not wholly consumed though it was substantially. A light snow fell during the night in which the tracks of some one were plainly visible; indicating that the person who made them did so in traveling from the Klokow place north to the turn of the road towards the home of the accused, and thence east on such road. He first came upon the scene the day after the fire at 7 or 8 o'clock. He visited the home of August Schwantes and inquired for the Klokows. He made no movement to examine the ruins or any suggestion in that regard. He visited various places and inquired of persons

there if they had seen the Klokows. No one but him, so far as appears, had any motive for destroying them. There were many circumstances of more or less significance pointing to him as guiltily concerned in their disappearance. He was soon suspected in that regard. He knew that fact and that the supposition was that the remains of the old people would be discovered in the ruins. The most significant of such circumstances, except those leading up to the time of the fire, were these: A strong probability that the fire occurred after 12 o'clock, at a time when it was least liable to attract attention, while he claimed it was first discovered about, or just before, 10 o'clock in the evening. Though he knew of the fire and was on the ground by 10 o'clock in the evening, as he confessed, he made no reasonable efforts to acquaint the neighbors with the circumstance of the fire or that of the disappearance of the old people, and made no effort to satisfy himself as to their whereabouts, until quite late on the following morning. He stood around, as he confessed, while the building was burning and then went home and to bed apparently unconcerned as to their fate. There was a light snow during the night. The tracks, evidently of the accused, indicated that they were made after the snow fell. In going to the fire, as he confessed, he proceeded by way of the road, a distance of about a mile and a quarter, instead of in a direct line which was about half a mile nearer. He showed more interest in the subject of insurance on the building than solving the mystery of the disappearance. When the ruins were officially examined to verify the supposition that the remains were there, which occurred two days after the fire, he seemed to shun the place. When, by invitation of the coroner, he visited the immediate scene and was informed of the vital interest people thought he had in the matter, particularly because of his being suspected of having fired the house and burned up the old people, he still remained indifferent. Though he was given a shovel by an officer and requested to assist in examin-

ing the ruins he neglected to do so and left the premises. He made no excuse for his conduct while there, except that he did not believe the remains were in the ruins but thought the Klokows went to a weaver's living some eight miles away. Though admonished by the officer to make search for them, if he thought they left the building, he did not visit the weaver mentioned, and later denied having said to the officer that he thought they went to the weaver's, and denied that there was any such place. The examination of the ruins resulted in its being demonstrated to a moral certainty that the remains of one or more human beings were there. Some bones and some teeth were found, which were shown to have been parts of a human body. Also a truss was found, such as Mr. Klokow was wont to wear. The story of the accused from the first was that he was informed of the existence of the fire by his wife some time after he retired for the night, and about 10 o'clock; that he observed at once that it was in the direction of the Klokow place; that he hurriedly dressed and went to the scene by way of the highway, stopping at the point where the road turns south, about thirty rods from the home of August Schwantes, and hollering three times; that when he arrived at the fire it had progressed so far that he could not enter the house; that he remained on the premises until about 12 o'clock, when the building was so far consumed that the outbuildings were substantially out of danger; that he then returned home and retired; that he paid no further attention to the matter until he got his chores done the next morning, when he started out and made inquiries, as before stated. Soon after the discovery of the remains, as aforesaid, a coroner's inquest was held, aud thereupon in due form of law he was charged with having maliciously taken the life of the Klokows. All these facts and others of a corroborative character, but by themselves of minor importance, were brought out on the trial. Under instruction by the court the jury, as indicated, decided that the evidence established beyond all

reasonable controversy that the lives of the Klokows were taken by criminal means, and that the accused was the guilty party. Various exceptions to rulings made during the trial and after the verdict were preserved for consideration, and in due form errors are now assigned thereon, which will be considered in detail.

By an oversight, the jury as impaneled and sworn included an alien. Both sides were ignorant of that circumstance until the trial had proceeded about a day. The incompetent juror then took out his second papers and the trial proceeded not only without objection on the part of the accused by reason of the incident, but by express consent given by his counsel. It was claimed after verdict, and is now claimed, that fatal error was committed in that respect. As counsel for the state suggest, this court has repeatedly held that the inclusion of an incompetent juror in a panel duly sworn in an action and service by such juror to the end of the trial does not invalidate the verdict, unless an objection to such juror on that ground is seasonably made and is insisted upon. Otherwise his participation in the trial will be deemed waived. That rule applies to criminal as well as civil cases. *Hogan v. State,* 36 Wis. 226; *Flynn v. State,* 97 Wis. 44, 72 N. W. 373; *In re Roszcynialla,* 99 Wis. 534, 75 N. W. 167; *Emery v. State,* 101 Wis. 627, 78 N. W. 145; *Cornell v. State,* 104 Wis. 527, 80 N. W. 745.

The most important complaint, as it seems to us, though not the one given the greatest prominence in the argument of counsel for plaintiff in error, in order of presentation at least, is that the verdict is not sustained by the evidence, in that the *corpus delicti* was not established with the requisite degree of certainty in any reasonable view of the matter. It is not contended but that the jury were fully warranted in finding from the evidence that the bodies of Mr. and Mrs. Klokow were destroyed by the burning of the house, but it is insisted that they were not warranted in deciding that the deaths of

the Klokows were produced by criminal means. True, the evidence to the jury on that point was purely circumstantial. True, also, it was the duty of the jury to find in favor of the accused, if in their judgment there was any reasonable theory based on the evidence that their deaths were not criminally produced. But the rule in that regard applies in a case of direct evidence as well as one of circumstantial evidence. The requisite degree of certainty to establish any essential fact in a criminal case is susceptible of being reached by one as well as the other, as this court in regard to the very matter in hand, upon careful consideration of the subject, decided in *Buel v. State,* 104 Wis. 132, 80 N. W. 78.

In testing the verdict of a jury having no direct evidence to support it as to the most essential element of the *corpus delicti,* no different rule is involved than in any other case, though there may be far less difficulty in reaching a conclusion that the verdict was unwarranted when there is more or less direct evidence on the point than otherwise. The field of reasonable inference from circumstantial guides is very broad. The trial court must necessarily determine whether any particular evidentiary fact by itself or with others in any reasonable view of the matter suggests the existence of the one sought for. Having arrived at a conclusion in the affirmative on that point the field of jury labor commences and within all reasonable limitations necessarily controls as to the result.

Wharton in his work on Criminal Evidence (9th ed.) at § 10 thus pictures the misunderstanding liable to occur as to the weight of circumstantial evidence:

"Much embarrassment has arisen over the position advanced by two eminent text writers, that, to justify the inference of legal guilt from *circumstantial* evidence, the existence of inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Judges, on hearing these expressions, have been apt, in the hurry of a trial, to accept and apply them; and hence have sprung up a

series of *dicta* to the effect that circumstantial evidence is to be viewed with distrust, and that, to justify a conviction on circumstantial evidence, it is necessary to exclude every possible hypothesis of innocence."

As has been indicated, circumstantial evidence must be sufficiently strong to exclude every reasonable theory of innocence, and that is likewise true of direct evidence. There should be no distrust thrown on the former even in regard to proof of the essential elements of the *corpus delicti*. If the punishment of criminal offenses were to wait upon the production of direct evidence of the body of the crime, or any other element necessary to conviction, there would be immunity in that regard in perhaps the majority of the most serious cases of criminal homicide and other most heinous offenses. In no other way can society be efficiently protected, wrongs redressed, and rights protected than to abide by what has been said. The instruction to a jury in cases of this kind often given, and very appropriately, that they should render a verdict of not guilty, unless, after a careful consideration of all the evidence, there is no reasonable theory based thereon consistent with the innocence of the accused, is not to be regarded as specially required because of special infirmity in circumstantial evidence, but as a method of emphasizing the rule that an accused person is entitled to go free unless his guilt shall be established beyond a reasonable doubt, and an admonition on account of the very serious nature of the consequences that might otherwise follow failure, to proceed with the greatest consideration and care, avoiding, so far as possible, all danger of giving way at any point to mere suspicion. Said an eminent judge:

"The truth is, that notwithstanding the admitted infirmity of human testimony, and the inherent defects of circumstantial evidence, they still are, and forever must be, the only solid foundations, on which reliance can be placed, for the due administration of all civil as well as of all criminal justice."

STORY, J., in *U. S. v. Gibert,* 2 Sumn. 19, 28, Fed. Cas. No. 15,204.

"Circumstantial evidence is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud." WHITMAN, C. J., in *Re Thorn,* 6 Law Rep. 49, 54.

"Circumstantial evidence is, in the *abstract,* nearly, though perhaps not altogether, as strong as positive evidence; in the *concrete* it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character is not so satisfactorily proved as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility." GIBSON, C. J., in *Comm. v. Harman,* 4 Pa. St. 269, 271.

Evidentiary facts established by evidence more or less direct pointing logically to the ultimate subject of search, have always been, and must necessarily always be, essential instruments in the administration of justice, and when established as they all should be, with the same degree of certainty as the ultimate fact is required to be established, they do not fall below, in probative force, direct evidence. One is as competent as the other to prove the real subject matter of the inquiry. From such evidentiary facts we reason inductively. Certain *indicia* are known by experience to characterize human actions. Those concomitant with any particular act being ascertained with the degree of certainty required as to the main fact, the latter, we reason logically, must necessarily exist also. Such process of reasoning goes to the ultimate point of inquiry with well-nigh, if not quite, the certainty of exact demonstration. We first conjecture that the subject of search exists and is discoverable. We prove its concomitant facts according to human experience and by the illumination thus produced we dissolve the mist characterizing the conjecture and bring into definite outlines that which was before hidden. *People v. Kennedy,* 32 N. Y. 141. If the picture thus disclosed to our view is the only one that can reasonably exist under the circumstances we stamp it, so to speak, as the truth

of the matter to a moral certainty,—the highest degree of certainty attainable in human affairs. *People v. Harris,* 136 N. Y. 423, 429, 33 N. E. 65. So it is said that "certain laws of moral conduct operate almost as infallibly as the mechanical laws of the material world."

It follows that if the evidentiary circumstances relied upon by the prosecution to prove the body of the crime in this case do so with the degree of certainty required in any reasonable view of the matter the weight of evidentiary suggestions was wholly for the jury to determine. In that light it seems that such facts were sufficiently established to carry the case to the jury in respect thereto. Most of them were established beyond controversy.

From all the evidence it appears clearly that the house was ignited on the inside. There is no suggestion in the record that the fire might have occurred by accidental means, except that it might have been started by a defective stove. Whether it was so started or whether, on the whole, there was any reasonable doubt about the matter was purely a jury question. The old people, according to the evidence, slept in a room separate from the one the stoves were located in, having a window affording easy egress from the building. The jury may well have deemed it wholly improbable that they were both overcome by heat or smoke before they had time to escape. The circumstances which occurred before, particularly on the fatal day, and those which occurred during the succeeding two days, as regards the conduct of the accused, may well be said to point with moral certainty to his having criminal knowledge of how the fatal occurrence took place. Looking at it from any reasonable standpoint, it is out of all harmony with innocence.

The relations between the parties a few days before the fire were so strained that both sides resolved to end the difficulty some way. The accused had been able to bridge over the matter so as to enable him to discuss with the old people

the question of a contractual settlement and to substantially, as he supposed, agree upon a basis therefor. During that time, as it seems, if at all, he secured Mr. Klokow's signature to the blank assignment on the insurance policy. That such assignment was not filled out and that the name was not affixed thereto at the particular time thereof are very suspicious circumstances, as the jury might well have viewed the matter. On the day of the tragedy the conflict was found by the accused to be irreconcilable upon any basis which he was willing to abide by, and straightway he proceeded to conduct himself regardless of the feelings of the Klokows. He was informed in the morning by the old gentleman that a settlement on the basis which he had supposed was satisfactory was out of the question: that his efforts in that regard were fruitless. He had good reason to suppose that the attitude of the Klokows in that regard meant submission by him or a judicial fight to the finish, jeopardizing not only his right to the property he held under the Klokow deed, but his own homestead. It seems, as the jury might well have concluded from the succeeding events of the day, that he was exceedingly angered thereby and became desperately inclined to proceed thenceforth according to his own notions of his rights under the contract, wholly regardless of whether it pleased or displeased the old people. He went home and soon re-appeared in company with his wife, whom he would not have brought upon the scene except in reckless disregard of the feelings of the Klokows, since the relations between her and Mrs. Klokow were particularly unpleasant. On this trip the sheep were driven away. He made a second trip in the afternoon and carted away lumber which he knew would greatly displease Mr. Klokow. Whether he was legally entitled to do as he did is not the question. His actions indicated the state of feelings between the parties and that it was one of bitter hostility.

On his last trip to the Klokow place, taking the accused at his word, he found the old people absent, affording him strong

reason to believe, in view of what had occurred during the day, that they had gone to initiate proceedings, or attempt to do so, to foreclose the mortgage. The condition as night came on, if the accused was morally weak enough to give way to the thought of ending the difficulty by destroying the Klokows, was such as to furnish an adequate motive therefor. No one else had any motive whatever to harm them or their possessions. There was good reason to believe with a high degree of certainty that the accused falsely stated the time when the fire started and that he made efforts to have August Schwantes come upon the scene. There was like reason for believing that instead of the fire starting at or before 10 o'clock in the evening, when it would have been liable to attract the attention of neighbors, it started after midnight and when least liable to attract such attention. One circumstanced as the accused was when he first saw the fire, taking him at his word, if he was innocent, would most naturally have taken the swiftest method and the shortest cut to the scene, instead of going on foot and nearly one-half mile out of the way. Arriving upon the scene and finding the doors closed at all points and so full of fire as not to admit of its being entered, or even looked into efficiently, and no indication that the inmates had departed therefrom, any one acting naturally under normal conditions would at the earliest possible moment, not waiting for a night's rest, have aroused the neighbors, and not being able soon to solve the mystery of their disappearance would have concluded that they were in the ruins and have taken all reasonable measures to verify such conclusion. The conduct of the accused in those respects, the jury were warranted in believing beyond all reasonable doubt, was not reconcilable with any reasonable theory of innocence, and that it was consistent with the idea that the accused knew an early disturbance of the ruins: a disturbance before the fire had time to do its work, would expose to view certain evidence of his crime. He made no suggestion at any time for an examina-

tion of the ruins. His conduct, as the jury had good reason to believe, was deliberately designed to delay such examination as long as possible. When the examination was in progress, as shown, he exhibited reluctance to be present and refused to assist in the work, suggesting that he believed the Klokows were on the night of the fire at a carpet weaver's, some eight miles away, though he had no such thought as he afterwards confessed and knew there was no such place for them to resort to. True, he denied making any such suggestion, but the jury were permitted to disbelieve him. Taking all the circumstances together they make out a pretty strong case, both as to the elements of the *corpus delicti* and as to the accused being the guilty party,—much stronger than many found in the books where verdicts of guilty were sustained upon appeal. Samples of such cases are given in *Buel v. State,* 104 Wis. 132, 142, 80 N. W. 78, the most significant being *State v. Williams,* 7 Jones' Law (N. C.) 446, and *People v. Alviso,* 55 Cal. 230 (erroneously cited in the *Buel Case* as "*Ex parte Kearney,* 55 Cal. 212"). Notwithstanding decisions may be found to the contrary, it is now elementary that in cases where, on account of the secretion of the body of the murdered person by burying the same at sea, or destroying it by fire or acid or other means, proof of the body of the crime by direct evidence is utterly impossible, and it is not regarded as in any sense necessary. Wharton, Homicide (2d ed.) § 640; *U. S. v. Gibert,* 2 Sumn. 19, Fed. Cas. No. 15,204.

Special complaint is made of the manner in which the state's attorney was permitted to cross-examine the accused. A large number of questions were asked based, as claimed by counsel for the accused, on mere imagination as to how the accused might have destroyed the old people and how he might have appropriated their personal belongings, in the whole suggesting the commission of the crime in a most brutal manner and the appropriation of the personal belongings of the victims. One difficulty with the matter is, generally speaking,

the questions were not objected to. That is probably accounted for by the fact that at the outset when objection was made the learned court said, in effect, that the cross-examination of a party who offers himself as a witness is not governed anywhere like that of other witnesses; that to "test his credibility or his accuracy or his memory" the court may permit such questions as it sees fit, even in respect to "utterly irrelevant matters." That may have persuaded counsel that there was no use of objecting further and to permit the very extravagant examination now complained of to proceed as it did at intervals, without further protest. The learned court was certainly wrong in ruling that the method of cross-examination to discredit a party, in the event of his being a witness, is any different from that in respect to any other witness. There is no rule with which we are familiar sanctioning any different method of examining one witness from that for examining another, for the mere purpose of discrediting his evidence, nor permitting the door to be thrown open so wide for impeaching evidence as to allow questions to be asked upon the pretense that the object is impeachment when there is no reasonable ground to expect favorable answers or to prove by direct evidence that the unfavorable ones are false, the sole tendency being, if not the purpose, to create suspicion in the minds of the jury prejudicial to the party. When questions are merely asked to browbeat, so to speak, or to annoy and confuse, or to create mere suspicion, they should not be allowed whether objected to or not. 1 Wigmore, Evidence, § 781. The learned court was wrong in saying for the purposes of impeachment the examination of a party, or any one else, can extend to matters "utterly irrelevant." The credibility of a witness upon a trial is an important feature of the case. Whatever tends legitimately to impair it is material: is relevant. Evidence having no such tendency, not otherwise material, is wholly collateral and falls within the rule of absolute exclusion. Anything so remote or collateral as not to

be a legitimate subject of proof as an independent fact at any stage of the case cannot be proved on cross-examination for the purposes of impeachment. That is, "matters utterly irrelevant" are not to be established by any method for any purpose. A witness may be asked on cross-examination if he has not been convicted of the commission of a criminal offense for the purpose of discrediting his evidence, because it is competent to prove such conviction as an independent fact for the same purpose. In other words, because the evidence is relevant, not direct to the main issue, but to the credibility of the witness produced to maintain such issue. *Att'y Gen. v. Hitchcock,* 1 Exch. 91, 93; 2 Wigmore, Evidence, §§ 1003, 1021; *People v. Chin Mook Sow,* 51 Cal. 597. True, proof of independent facts of the character stated must ordinarily, first, as a matter of justice to the witness, be preceded by his examination in respect thereto, but such examination is permissible because the facts sought to be elucidated are not wholly irrelevant.

From what has been said it seems that the grounds for the learned court's ruling were wrong even if the examination can be justified. There is no disposition to restrain the broad discretionary authority of a trial court as to permitting a most searching cross-examination for the purposes of impeachment. Such an examination is a very important instrument in the administration of justice, but it has its limits. When the questions are asked within the legitimate field, discretionary authority should not be exercised to allow it to proceed unfairly. The examination should not be allowed to enter the domain of merest conjecture, counsel not having any expectation whatever of receiving answers in harmony with imagined facts, or ability to prove such facts directly or circumstantially. Such mere imaginings, which cannot in the very nature of things be verified, should not be the basis of questions to a witness, which can serve no other purpose but one to create prejudicial suspicion in the minds of the jurors.

We are constrained to say that the circuit court in this case

allowed the examination of the accused to proceed too far, and yet we hesitate, we decline, to condemn it as remediable harmful error, because only the initiatory question, which, standing by itself, was not appreciably prejudicial, was objected to, and because there was some shadow of excuse for the questions. There was evidence strongly indicating that the accused took the lives of the Klokows by violence in some way. An ax was found near their remains which might have been used to perpetrate the deed. There was proof that some of the bones found were broken by means other than the effect upon the body of the fire and its consequences. *Buel v. State, supra,* and *Barton v. Bruley,* 119 Wis. 326, 96 N. W. 815, relied upon by counsel for plaintiff in error, do not apply because the questions here were all within the field of the *res gestæ.* There is some ground for sustaining the court's action as within discretionary authority, in a very broad view of it, aided by the fact that the examination complained of, in the main, occurred without objection. It were better not to have permitted it. We say this without intending to cast the slightest reflection upon the motives of the eminent judge who presided at the trial.

Complaint is made because the wife of the accused, who acted as his bookkeeper in respect to articles furnished the Klokows under the contract, was not permitted to verify the book which she kept. The evidence was offered with other proof for the purpose of showing that the complaints made by the Klokows as regards the accused having failed to keep his agreement were without foundation. We are unable to see how the point is material under all the circumstances,—whether the accused was or was not derelict in his duty. The fact is undisputed that the old people were dissatisfied with his conduct and that the relations between the parties were so strained at the time of the fatal occurrence that the accused was bent on terminating the contract in some way, and the Klokows were likewise determined. The state of feeling ex-

isting, not the cause of it nor the real right of the matter, was the basic feature of the motive for destroying them. The exclusion of the evidence was likewise nonprejudicial because the book was received in evidence upon the verification of the accused either as an independent evidentiary instrument or as a part of his evidence. All the charges were as fully established as they could have been by the addition of the evidence of Mrs. Schwantes. The book was fully identified as the one kept by her, and was verified without objection as being a true record, and was received in evidence before she was called to the stand. She was "only called to identify the book and the entries," not to verify it so as to make the same independent evidence. That having been sufficiently done, or the defect in that regard waived, the exclusion of her evidence certainly was harmless, though we must say in passing that the ground stated for the ruling is unsound. By one of the most familiar rules a wife is a competent witness to testify to anything which she does within the scope of her agency for her husband. The idea of the learned court that she could not testify at all, regardless of that rule, because "the question was not based on the book" is novel. We are not familiar with any such rule. There is none, we are constrained to declare most distinctly. On the contrary, in any situation, where an evidentiary fact is material as regards a party to an action, and the wife of such party acted as his agent in regard to the matter, her acts within the scope of her agency may be testified to by her. *Birdsall v. Dunn,* 16 Wis. 235; *Mountain v. Fisher,* 22 Wis. 93; *Chunot v. Larson,* 43 Wis. 536; 3 Jones, Evidence, § 758.

Further complaint is made because of the exclusion of opinion evidence as to how such a house as the one in question would burn. The learned attorney general justifies that upon the ground that the evidence did not relate to matters of "science, art, or skill," citing *Daly v. Milwaukee,* 103 Wis. 588, 79 N. W. 752, and similar cases. The quoted expression,

often found in decisions, in a view that might be taken thereof conveys rather too narrow an idea of the scope of opinion evidence. It may have no appreciable connection whatever with "science, art, or skill," in a technical sense, and yet be admissible just as clearly as if it possessed such connection. All opinion evidence is not expert evidence in the technical sense, but all expert evidence is opinion evidence in any view of the matter, and all admissible opinion evidence is expert evidence in the general—the legal—sense of the term. The term "skill," as used in the quoted expression, must be regarded in its broadest signification, not applied necessarily only to mechanical or professional knowledge. It includes every subject susceptible of special and peculiar knowledge derived from experience. The term "science, art, or skill" as a limitation of expert evidence is more of a lexiconic than judicial origin. Webster defines the noun "expert" as "One who has skill, experience, or peculiar knowledge on certain subjects of inquiry in science, art, trade, or the like; a scientific or professional witness." That strictly construed is hardly a safe guide. The law writers define the term as "a person having special knowledge and skill in the particular calling to which the inquiry relates," illustrating the same by such excerpts as these: "One who has made the subject matter of the inquiry the object of [his] particular attention and study" (*Page v. Parker,* 40 N. H. 47, 59); "A man of experience in the particular business to which the inquiry relates" (*Doster v. Brown,* 25 Ga. 24); "A skilful or experienced person; a person having skill, experience, or peculiar knowledge on certain subjects or in certain professions" (*Heald v. Thing,* 45 Me. 392), together with others more in harmony with the first quoted expression. Lawson, Expert & Opin. Evidence, 229. In 1 Wharton, Evidence (3d ed.) § 444, it is stated that expert evidence is not confined to matters involving "abstruse scientific conditions," giving numerous illustrations covering many subjects having nothing whatever to do with "science,

art, or skill" in a scientific or professional sense. This court is in harmony therewith. It has distinctly said that any subject wherein a person may become specially learned is within the broad field of expert evidence, the question as to the subject and the special qualification in each instance to be solved by the trial court in passing on the competency of the witness, in which field, within all reasonable limitations, its judgment is to be respected. *Northern S. Co. v. Wangard,* 123 Wis. 1, 100 N. W. 1066; *Zimmer v. Fox River V. E. R. Co.* 123 Wis. 643, 101 N. W. 1099; *Hupfer v. Nat. D. Co.* 119 Wis. 417, 96 N. W. 809; *Emery v. State,* 101 Wis. 627, 648, 78 N. W. 145.

Turning now to the evidence in question and testing the same by what has been said we are unable to condemn the ruling. It was placed on the ground that in the vicinity where the cause was tried and from which the jury were drawn knowledge of the manner in which a structure made of logs would burn was common. Moreover, before the ruling was made counsel for the accused informed the court that they did not seek to interrogate the witness as an expert. Obviously, only as such could one give opinion evidence.

Josephine Butters, testifying on behalf of the state as regards when the fire occurred, said, in effect: She woke up in the night and saw the light of a fire; that she soon discovered that it was the Klokow house; that she watched it fifteen or twenty minutes and thought the old people were burning; that soon thereafter she returned to her bed, but did not go to sleep; that it was one and a half or two hours after she saw the fire before she got up in the morning; that she arose before daylight and prepared the morning meal, and that the family ate by lamplight. Up to that point in the witness's evidence there was no objection. This question was then asked: "How long do you think it was from the time you saw the fire to daylight in the morning?" To which answer was made, under objection: "I should think it would be three or

four hours anyway. . . . When I say daylight I mean just the beginning of daylight." The objection to the question was on the ground that it was too indefinite. We fail to see the suggested indefiniteness. It may be that counsel meant that the evidence called for was too indefinite to be worthy of consideration by the jury. No explanation is furnished us in the brief treatment of the matter by counsel. Assuming that the objection was based on the reasons suggested, the ruling was proper. We suppose any person of mature years and ordinary experience in life may give evidence, where the matter is material, of his estimate of the flight of time by hours or minutes of a particular day or portion of a day during which he was in possession of his senses, the weight thereof being for the jury.

Error is assigned because the district attorney was permitted to testify to the circumstances of his having found a key at the Klokow place several months after the fire. It was one of the articles which probably went through the fire and the witness was merely called on to identify it. No reason is suggested by counsel why the evidence was improper or why it was prejudicial. We perceive none.

Lastly on this branch of the case error is assigned for the refusal of the court to permit evidence by a witness as to statements made by Mr. Klokow to the former, some over a month before the fire, in regard to the contract. No reason is assigned by counsel why that was material, or even the exclusion of it prejudicial. It seems that it was properly excluded as mere hearsay.

A number of exceptions were taken to the court's instructions to the jury. All have been examined. We deem it unnecessary to specially mention any except those which counsel consider of sufficient importance to support by argument to some extent.

The jury were instructed that the prosecution was not

called upon to prove the precise manner in which the death of the Klokows was caused. By that, in connection with other instructions, they were informed that if they were satisfied from the evidence beyond a reasonable doubt that the accused was guilty of the crime charged they should find a verdict accordingly, though they might be uncertain as to the precise criminal means by which death was reached. We discover no infirmity in that. It necessarily must follow from what has been said as to the manner of proving the *corpus delicti* that it is not necessary in such a case as this to prove the precise means by which the death was caused. A person destroys the life of another and the body is buried at sea. It is impossible to ever prove whether the death was caused by the victim being cast while alive into the sea, or whether life was taken and the body then so cast, or if the latter, whether life was taken by shooting, cutting, poison, or other means. If it were essential to make such proof in order to convict, obviously all one would have to do in order to defy efforts to punish him for criminal homicide would be to absolutely annihilate the body of his victim.

The jury were instructed that they were to inquire whether the Klokows came to their death by any other means than violence at the hands of the accused, such as by suicide, by accident, or by violence of some third person. We perceive no error in that. Certainly the jury were required to acquit the accused, if, in their judgment, there was any reasonable theory consistent with his innocence, and, under the circumstances of the case, the matters referred to were proper for consideration.

On the question of whether the fire was caused by accident the court said, substantially: The state has offered evidence as to the situation existing at the time as to the habits of the Klokows and the condition of the stoves. The defendant has offered evidence tending to show that the box stove was not in good repair; that it was cracked, and that the catch which held

the door shut was broken off. As to the theory that the fire was accidentally caused by coals falling from the defective stove, you are to consider the likelihood that one or both of the Klokows would have escaped, and you are, of course, to consider the evidence as to the finding of teeth and pieces of what witnesses said are portions of the human skull, and the manner in which these bones were found to be broken. If those are fragments of a human skull, would their condition be accounted for on the theory that they were broken into pieces by the falling timbers? The burden of the complaint is that the court in reciting the evidence failed to call the jury's attention to all the evidence bearing on the subject, and that it was prejudicial to single out some of the evidence and give it significance by the special mention. Testing the instructions by the record we are unable to discover any evidence of any particular importance that was not referred to. There was no attempt on the part of the court to state all of it or give the jury an idea that they were to determine the matter from the evidence called particularly to their attention, nor was there any indication that counsel called the court's attention to omitted evidence when there was full opportunity to do so. The court may direct in a fair manner the attention of the jury to the obviously most significant features of the evidence upon both sides, coupling the same with an admonition to consider the same and all of the other evidence bearing on the question. It is not prejudicial error to do so. *Horr v. C. W. Howard Co.* 126 Wis. 160, 105 N. W. 668. That was what the court did in this case. After citing the attention of the jury, as indicated in the quoted instruction, this language was used:

"There is other evidence bearing on this question to which it is not necessary for the court to refer. You will consider it all. And you will understand that the court, by reference to certain circumstances, does not intend to suggest any conclusion as to their effect. All the questions in the case are for the jury."

The jury were further instructed:

"The defendant has testified to his actions and conduct on the night of the fire. You are to inquire whether this is indicative of innocence or guilt and whether it is consistent with the hypothesis that the defendant did not criminally cause the death of these parties."

"Considering the character of man the evidence discloses the defendant to be, does there appear to have been a motive to move him to commit this crime?"

"But the public, the state, has rights also. Human life is sacred and crime should be discovered and murderers punished. If the defendant has been proved guilty beyond any reasonable doubt, you will do your duty firmly and conscientiously and render a verdict of guilty."

It is suggested that the quoted language tended to convey to the jury that the trial court believed the accused to be guilty. No good reason, in fact no reason at all, is given in support of that suggestion. We cannot discover any. Those instructions seem to be fair in every respect and perfectly appropriate to the case. It is said that the last one was specially harmful, coming as it did, at the close of the instructions. Not so. It was a correct and very appropriate statement of the law, and admonition to the jury that the right of the public to have the law vindicated by the conviction of the accused, if the evidence established his guilt beyond a reasonable doubt, was equally important with the right to have it vindicated by his acquittal if guilt was not shown. It was a legitimate stimulus to the jury to perform the duty assigned to them fearlessly having regard to the public and the accused as well. The language mentioned was used in connection with this:

"You are to carefully guard the rights of the defendant. His liberty and life are dear to him and his family. If there is any reasonable doubt of his guilt, he should be acquitted."

The foregoing covers the points presented for consideration. They do not involve any question of law not well settled by decisions of this court. The sufficiency of the evidence, both

to establish the body of the crime and the guilty knowledge of the accused, was for the jury. It is no justification for the assault on their conclusion to say, even justly, that they might have come to a different conclusion. If it were otherwise a large proportion of verdicts rendered in judicial trials would be subject to successful challenge upon appeal. Is it clear that reasonable minds could not fairly have come to the conclusion which the jury arrived at? That question must be resolved in the affirmative in order to condemn the verdict as not justified by the evidence. So, if it were conceded that the accused made in words a reasonable explanation of the incriminating circumstances which challenged response of that character, still the fact remains that the jury were permitted to disbelieve him. If it were conceded that the jury might have reasonably concluded that the house was fired by accidental means, or if not, that the accused did not do the deed, still the fact remains that under all the circumstances it was within their province to conclude that the hand of the accused did the work. The motive was present. No one else had any such motive. The opportunity was present. The time of doing the deed was aptly chosen, as the jury might well have concluded, and that the accused attempted by falsehood to deny that fact. His conduct after the fire, as the jury might well have viewed the matter, was utterly inconsistent with any reasonable theory of innocence. While one so circumstanced would have shown the greatest anxiety to solve the question of whether the remains of the disappeared were in the ruins, the accused showed the utmost reluctance in that regard and even went to the length, as the jury probably and justifiably concluded, to discourage search by suggesting falsely that he believed the old people went to a distant point, mentioned, on the night before thefire. It may be that some reasonable minds might have viewed the evidence as a whole as weak, and far too much so to warrant the verdict rendered, yet the fact remains that other reasonable minds might well have

come to the conclusion that the evidence unmistakably pointed to the truth of the matter in harmony with the verdict; that all the incriminating circumstances were established beyond a reasonable doubt, and all pointed to the fact of guilt, and were all inconsistent with any other reasonable theory. So no other conclusion can be reached but that justice has been done, so far as it is given to human tribunals to determine the matter.

By the Court.—The judgment is affirmed.

BROWN, Plaintiff in error, vs. THE STATE, Defendant in error.

January 13—January 30, 1906.

Criminal law and practice: Rape: Elements of offense: Resistance: Evidence: Weight and sufficiency: New trial: Court and jury: Coercion of verdict: Information: Omission of the word "feloniously:" Mental condition: Appeal and error: Admission: Res gestæ: *Request for instructions: Immaterial error: Exceptions.*

1. Subject to the exception where the power of resistance is overcome by unconsciousness, threats, or exhaustion, in order to constitute the crime of rape not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means and faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.
2. In a prosecution for rape no mere general statement of the prosecutrix, involving her conclusion that she did her utmost and the like, will suffice to establish such requisite fact of resistance, but she must relate the very acts done, in order that the jury and the court may judge whether any were omitted.
3. While the crime of rape can be established by the uncorroborated testimony of the sufferer, without such corroboration her testimony must be most clear and convincing.
4. In a prosecution for the crime of rape the evidence, stated in the opinion, is *held* to present no proof of such resistance as

is essential to that crime, and that a new trial should have been granted on that ground.

5. A verdict cannot stand where the jury have been subjected to any statements or directions naturally tending to coerce or threaten them to agreement either way, or to any agreement at all, unless it be clearly shown that no influence was thereby exerted.

6. Under the facts, stated in the opinion, an officer's warning to the jury that they would be locked up for the night unless they agreed very soon, is *held* both threatening and coercive, and as naturally tending to induce the jurymen to surrender their opinions.

7. Where, in an information charging the crime of rape, the offense denounced by sec. 4381, Stats. 1898, is otherwise set forth with such degree of certainty that the court can pronounce judgment according to the right of the case, the absence of the word "feloniously," or its equivalent, if a defect, is in mere matter of form not tending to the prejudice of the defendant, does not affect his substantial rights, and the information is *held* sufficient.

8. Where a mere mental condition is material, the person whose intent is material should be allowed to testify directly to the existence or nonexistence of such mental state.

9. Such evidence, however, is to be weighed with due regard to the ease of the statement and the difficulty of refutation.

10. In a prosecution for the crime of rape it is proper, on the direct examination of the prosecutrix, to ask her if the act of defendant "was against her will," if thereby is intended mere inquiry into her mental state of willingness or unwillingness.

11. In a prosecution for the crime of rape a physician, called by the defendant, was asked whether at the time of a physical examination of the prosecutrix she stated to the witness that she had made no resistance or fight, and it was *held* proper to refuse to permit the question to be answered:

(1) For the reason that the witness had already been allowed to answer the same question.

(2) The prosecutrix was not a party so as to render her admissions competent evidence.

(3) The only way in which such a statement could be made admissible would be either, first, by laying a foundation for its reception as impeaching evidence; or secondly, by the state first giving evidence of parts of the same transaction whereby the defendant might be entitled to prove the remainder.

(4) Such statements, while *res gestæ* to the physical examination, were not admissible as *res gestæ* of the offense itself.

12. Where the court, in its general charge, gave correctly an abstract rule of law, and there must be a reversal on other grounds, it is not necessary to decide whether the charge sufficiently met specific instructions asked.
13. In the absence of exceptions there cannot be reversal for alleged errors.

ERROR to review a judgment of the circuit court for La Fayette county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Writ of error to review conviction for rape and ten years' sentence to the state reformatory. The information alleged that "on the 27th day of October, in the year 1904, at said county, *Grant Brown* did ravish and carnally know one Edna Nethery, a female of the age of fourteen years and more, by force and against her will and against the peace and dignity of the state of Wisconsin." The two parties were children of neighboring farmers who had known each other all their lives. The accused was twenty years old, the prosecutrix sixteen. Within the year before the event they had been thrown to some extent in company at social gatherings, at one of which at least had occurred direct personal contact in some games described as involving "kissing forfeits." On October 29th the prosecutrix went by a usual path across fields to her grandmother's house for the purpose of having an aunt try on certain clothing being made for her. Such path passed by and over parts of the farm of defendant's father. Defendant was in the field driving out hogs and repairing a fence, and, as prosecutrix reached a stile, he was close thereto, so engaged. She addressed him in a playful way with reference to his work, and he suspended the same and came up to her. Her story is that he at once seized her, tripped her to the ground, placed himself in front and over her, unbuttoned her underclothing, then his own clothing, and had intercourse with her; that the only thing she said was to request him to let her go,

and, throughout the description of the event, her only statement with reference to her own conduct was, repeatedly:

"I tried as hard as I could to get away. I was trying all the time to get away just as hard as I could. I was trying to get up; I pulled at the grass; I screamed as hard as I could, and he told me to shut up, and I didn't, and then he held his hand on my mouth until I was almost strangled."

Also that at one time she got hold of the fence to try to pull herself away. Whenever he removed his hand from her mouth she repeated her screams. She denies any recollection as to the position of her limbs at any of these times, or where his were with reference to herself. She confined her statement of the force used by him to the actual sexual penetration. She makes no mention of any use of her hands or her lower limbs. After the completion of the intercourse she says he made her promise not to tell, and, upon her doing so, allowed her to arise. She says she made the promise because she was afraid of him, and did not know what he would do if she did not. Thereupon she proceeded to her grandmother's house, something more than a quarter of a mile, but, before entering the house, went into a shed, slightly off her direct course, to arrange her underclothing. There she discovered flow of blood, and, as she states, became frightened and rushed into the house to her aunt, where she at once exclaimed, "*Grant Brown* has [done something] to me. O! What shall I do?" Whereupon the aunt immediately took her home and informed her mother. She was taken to the family physician for examination, who, however, postponed it until the next day, when, in company with another physician, a physical examination was made, disclosing fresh rupture of the hymen and a condition of the genital parts indicating recent sexual intercourse, but not significant as to whether the same had been accomplished forcibly or otherwise. Her person nowhere showed any bruises or injuries, nor did her clothing, except for a rip about an inch long in her drawers. At this examination she

stated to one of the physicians that she had not resisted or made any fight. The defendant's story differed only in some details and in the denial of any resistance, asserting that when she came where he was at work and addressed certain playful remarks to him he approached her, placed his arm about her and indulged in certain liberties with her person, to which she offered no resistance, whereupon he laid her down and had intercourse with her, she at no time making any resistance or outcry. There were no marks upon his face, hands, or clothing of any struggle. Accused was a well-matured girl for her years, weighing 117 pounds. About a week before the event she had been ill with measles for four or five days, and made some suggestion that she had not fully recovered her strength on October 29th. Defendant's physical characteristics are shown only to the extent that he weighed 150 pounds, and had been brought up on a farm doing farm work.

After verdict of guilty a motion to set aside the verdict and for a new trial was made, for insufficiency of evidence, and also upon the ground, among others, of improper influence upon the jury. Affidavits of two of the jurymen were presented, showing that the jury retired about 5:30 p. m., at 7 o'clock were taken to a hotel for supper, and, after supper, several of them contributed $2 for the purchase of a box of cigars, the smoking of which in the jury room immediately commenced. That room was eighteen by fifteen feet, and the air became very foul. These two jurors, who at that time were the only ones remaining opposed to conviction, were not users of tobacco and were made seriously ill, had to leave the room for a time, and afterwards suffered seriously from such illness, although their fellow jurymen had suspended smoking in deference to their condition. That about 10:30 the officer in charge informed the jury "that the judge of the court was about to go to his hotel for the night, and that the jury, as a consequence, would be locked up for the night unless they very soon agreed upon a verdict." The jurymen supposed, of

course, that such incarceration would be in the room where they then were, although the judge had instructed the officer to clear out the courtroom and allow them to use that, but had given no directions that such fact be communicated to the jury. The affidavits proceed to state that, induced by this statement and in apprehension of serious illness if they were not able to escape from the vitiated atmosphere and have rest, these jurors announced their willingness to agree upon a verdict of guilty, although they still believed the defendant innocent, and after a short time such a verdict was agreed to, returned into court, and assented to upon polling of the jury. There were filed affidavits of the other jurors minimizing in some degree the apparent illness and suffering of these two jurors, and asserting that at first, when they offered to vote for conviction with the statement that they did so contrary to their opinions and merely to escape, their ballots were refused, but afterwards received. The judge also filed a statement upon the record exculpating himself from knowledge of the illness of these jurors. The fact of the communication by the officer was not denied, nor the illness, in some degree, of these two jurors as a result of the polluted atmosphere of the jury room. The motion for a new trial being overruled, and sentence pronounced, the defendant sued out this writ of error to review the same.

For the plaintiff in error there was a brief by *Orton & Osborn* and *E. F. Conley,* and oral argument by *P. A. Orton.*

For the defendant in error there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and oral argument by *Mr. Titus.*

DODGE, J. 1. As the statement of facts discloses, the only mooted question was that of prosecutrix's physical resistance to the act of intercourse, and, as to this, counsel for plaintiff in error urges, with great force, that there was not evidence sufficient to satisfy any reasonable mind, beyond reasonable

doubt, of such resistance as the law makes *sine qua non* to the crime of rape. We need not reiterate those considerations of the ease of assertion of the forcible accomplishment of the sexual act, with impossibility of defense save by direct denial, or of the proneness of the woman, when she finds the fact of her disgrace discovered or likely of discovery, to minimize her fault by asserting *vis major,* which have led courts, and none more strenuously than this, to hold to a very strict rule of proof in such cases. *Conners v. State,* 47 Wis. 523, 2 N. W. 1143; *Whittaker v. State,* 50 Wis. 518, 7 N. W. 431; *Bohlmann v. State,* 98 Wis. 617, 74 N. W. 343; *O'Boyle v. State,* 100 Wis. 296, 75 N. W. 989; *Devoy v. State,* 122 Wis. 148, 99 N. W. 455. Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated. We need not mention the exception where the power of resistance is overcome by unconsciousness, threats, or exhaustion, for, in this case, there is no proof of any of those things. Further, it is settled in this state that no mere general statements of the prosecutrix, involving her conclusions, that she did her utmost and the like, will suffice to establish this essential fact, but she must relate the very acts done, in order that the jury and the court may judge whether any were omitted. *Bohlmann v. State, supra; Devoy v. State, supra.* Turning to the testimony of prosecutrix, we find it limited to the general statement, often repeated, that she tried as hard as she could to get away. Except for one demand, when first seized, to "let me go," and inarticulate screams, she mentions no verbal protests. While we would reasonably recognize the limitations resting on many people in attempting expression and description, we cannot conceive it possible that one whose mind and exertions had, during an encounter of this sort, been set on resistance, could or would in narrative mention

nothing but escape or withdrawal. A woman's means of protection are not limited to that, but she is equipped to interpose most effective obstacles by means of hands and limbs and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insuperable in absence of more than the usual relative disproportion of age and strength between man and woman, though no such impossibility is recognized as a rule of law. 3 Wharton & S. Med. Jur. §§ 172, 188, and authorities cited; 1 Beck, Med. Jur. 203. In addition to the interposition of such obstacles is the ability and tendency of reprisal, of counter physical attack. It is hardly within the range of reason that a man should come out of so desperate an encounter as the determined normal woman would make necessary, without signs thereof upon his face, hands, or clothing. Yet this prosecutrix, of at least fair intelligence, education, and ability of expression, in her narrative mentions no single act of resistance or reprisal. It is inconceivable that such efforts should have been forgotten if they were made, or should fail of prominence in her narrative. The distinction between escape and resistance is admirably discussed by RYAN, C. J., in *State v. Welch,* 37 Wis. 196, 201. Resistance is opposing force to force (Bouvier), not retreating from force. These illustrations but serve to point the radical difference between the mental conception of resistance and escape and emphasize the improbability that if the former existed only the latter would have been mentioned. This court does not hold, with some, that, as matter of law, rape cannot be established by the uncorroborated testimony of the sufferer, but, in common with all courts, recognizes that, without such corroboration, her testimony must be most clear and convincing. Among the corroborating circumstances almost universally present in cases of actual rape are the signs and marks of the struggle upon the clothing and persons of the participants, and the complaint by the sufferer at the earliest opportunity. In the present case the former is absolutely

wanting, for the one-inch rip in prosecutrix's underwear was not shown to be of a character or location significant of force or violence. Not a bruise or scratch on either was proved, and none existed on prosecutrix, for she was carefully examined by physicians. Her outer clothing not only presented no tearing, but no disarray, so far as the testimony goes. When one pauses to reflect upon the terrific resistance which the determined woman should make, such a situation is well-nigh incredible. The significance of the other corroborative circumstance, that of immediate disclosure, is much weakened in this case by the fact that prosecutrix turned from her way to friends and succor to arrange her underclothing and there discovered a condition making silence impossible. Such facts cannot but suggest a doubt whether her encounter would ever have been disclosed had not the discovery of blood aroused her fear that she was injured and must seek medical aid, or at least that she could not conceal from her family what had taken place. Nor is this thoughtfulness of the disarrangement of her clothing consistent with the outraged woman's terror-stricken flight to friends to give the alarm and seek aid which is to be expected. We are convinced that there was no evidence of the resistance which is essential to the crime of rape, and that the motion for new trial should have been granted on that ground.

2. Was there improper influence exerted upon the jury? The rule has become fully settled in Wisconsin that a verdict cannot stand when the jury have been subjected to any statements or directions naturally tending to coerce or threaten them to agreement either way, or to agreement at all, unless it be clearly shown that no influence was thereby exerted. *Roman v. State,* 41 Wis. 312; *McBean v. State,* 83 Wis. 206, 53 N. W. 497; *Hodges v. O'Brien,* 113 Wis. 97, 88 N. W. 901; *Secor v. State,* 118 Wis. 621, 637, 95 N. W. 942; *Koch v. State,* 126 Wis. 470, 106 N. W. 531. It has been said that reasonable ground to suspect such influence suffices. *Roman*

v. State, supra. Presumption of prejudicial effect arises in absence of clear proof to the contrary. *Keenan v. State,* 8 Wis. 132; *State v. Dolling,* 37 Wis. 396; *Peppercorn v. Black River Falls,* 89 Wis. 38, 41, 61 N. W. 79; *Hempton v. State,* 111 Wis. 127, 147, 86 N. W. 596. It is even stronger in case of improper statements by an officer than if by the trial judge. *Hempton v. State,* 111 Wis. 127, 149, 86 N. W. 596. Whether testimony of jurors as to their own mental processes, either in support or denial of the effect of statements or conduct, can be received at all, may well be doubted (*Hempton v. State, supra; Wolfgram v. Schoepke,* 123 Wis. 19, 24, 100 N. W. 1054; *Woodward v. Leavitt,* 107 Mass. 453, 466), but is not important here, for there is none offered to negative effect upon some of the jurors, and the direct evidence of the two jurors as to their mental processes or reasons may be disregarded in view of the presumptions above stated. Such affidavits were admissible to prove the physical conditions and the statement of the officer. *McBean v. State,* 83 Wis. 206, 210, 53 N. W. 497; *Hempton v. State, supra; Woodward v. Leavitt, supra.* In view of the conditions under which the jurymen were suffering, it is unquestionable that the officer's warning that they would be locked up for the night unless they agreed very soon was both threatening and coercive, and naturally tended to induce surrender of their opinions. While jurymen, in performance of the high civic function entrusted to them, ought to adhere to their deliberate and conscientious convictions notwithstanding personal inconvenience or suffering, it is not the policy of the law that rights of litigants, especially those charged with crime, shall be made dependent on the existence of such Spartan devotion to duty. We cannot avoid the conclusion that the verdict before us was fully proved to have been rendered under such threats and coercion that it should have been set aside.

3. The information was assailed, both before plea and after verdict, because of omission of the word "feloniously"

or some equivalent therefor. A mass of authority, ancient and modern, from which many decisions and text-writers are cited, support this assault, and declare the necessity of the adverb "feloniously" to a good charge of rape. There are exceptions, for citation of which, also, we are mainly indebted to the industry and fairness of counsel for plaintiff in error. Some of these rest directly upon statutes authorizing the omission of the very word itself; others on more general statutes, and still others upon the disappearance, in America, of the ancient common-law distinctions between felonies and misdemeanors and results of convictions of either. *Comm. v. Scannel,* 11 Cush. 547, 548; *People v. Olivera,* 7 Cal. 403; *People v. Garcia,* 25 Cal. 531; *Bruguier v. U. S.* 1 Dak. 5, 46 N. W. 502; *Jane v. Comm.* 3 Met. (Ky.) 18; *State v. Felch,* 58 N. H. 1; *State v. Tourjee,* 26 R. I. 234, 58 Atl. 767; Whart. Cr. Pl. & Pr. (9th ed.) § 260. At the common law criminal pleading became burdened with numerous technicalities and refinements, some of them founded upon practical and cogent reasons then existing, others upon grounds almost fanciful. In the same spirit with their Civil Codes most states have, by statutes, swept away many of these requirements in the interest of simplicity and directness. Hardly anywhere have such legislative attempts been accorded more comprehensive effect by courts than in Wisconsin. Some of our statutes on the subject are the following: Sec. 4650, Stats. 1898, requiring an offense to be charged "in plain, concise language, without prolixity or unnecessary repetition;" sec. 4658, Stats. 1898, declaring information sufficient "if it can be understood therefrom that the offense charged is set forth with such degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case;" sec. 4659, Stats. 1898, providing that no information shall be vitiated by omission of " 'with force and arms' or any word of similar import, . . . or by reason of any other defect or imperfection in matters of form which shall not

tend to the prejudice of the defendant;" sec. 4669, Stats. 1898, directing that, after verdict, an information shall suffice which defines a statutory offense in the words of the statute or in words of substantially the same meaning; and finally, sec. 2829, Stats. 1898, applicable alike to civil and criminal proceedings (*Cornell v. State,* 104 Wis. 527, 80 N. W. 745), commanding: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." The policy of liberality evinced by these statutes was declared in the apt words of MARSHALL, J., in *State ex rel. Durner v. Huegin,* 110 Wis. 189, 232, 85 N. W. 1046. Under them, omissions of such elements as "against the peace and dignity of the state" or "against the statutes in such case made" or "unlawfully" have been held immaterial. *Nichols v. State,* 35 Wis. 308, 312; *Hintz v. State,* 58 Wis. 493, 17 N. W. 639; *Murphy v. State,* 108 Wis. 111, 115, 83 N. W. 1112; *State ex rel. Durner v. Huegin, supra; Hanley v. State,* 125 Wis. 396, 104 N. W. 57. Sufficiency of a description of the offense in the words of the statute wherever the statute so individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what offense he is held for, both before and after verdict, has been repeatedly decided, approving Whart. Cr. Pl. & Pr. (8th ed.) § 220; *Bonneville v. State,* 53 Wis. 680, 686, 11 N. W. 427; *Steuer v. State,* 59 Wis. 472, 18 N. W. 433; *State v. Mueller,* 85 Wis. 203, 55 N. W. 165; *Fischer v. State,* 101 Wis. 23, 76 N. W. 594. Other instances of the application of above cited statutes are *State v. Boncher,* 59 Wis. 477, 481, 18 N. W. 335; *Sires v. State,* 73 Wis. 251, 255, 41 N. W. 81. The question whether the acts constituting an offense of which the elements are fully defined and the punishment is prescribed by statute is a felony or misdemeanor is no longer a very material one. All the results

are the same in either event, namely, those denounced by the statute. Forfeiture of estate or benefit of clergy no longer follows one holding or the other. See *State v. Felch, supra.* Doubtless it is essential now, as of old, that the information or indictment must, without intendment, declare all the elements essential to the crime, and with so much of description and certainty as to fully inform the accused of the specific acts claimed to constitute the crime and the crime which they are claimed to constitute. *Bates v. State,* 124 Wis. 612; *Steuer v. State, supra.* If it do this, however, the statutes above mentioned certainly declare its sufficiency. In the present information we find it charged that the defendant did exactly that to which the law affixes the punishment. It could not fail to inform him and the court what acts were alleged to be criminal nor what crime was charged; neither could there be any doubt that conviction or acquittal would fully protect him against further prosecution for that crime. What, then, could be added by alleging such acts to have been done feloniously? The purpose of such assertion, originally, was to show upon the record that the prisoner was not entitled to benefit of clergy (Whart. Cr. Pl. & Pr. § 260), or perhaps that forfeiture of estate must result (*Wilson v. State,* 1 Wis. 184, 188); but no such purpose could be served at the present time. It is suggested that the word in question might supply some other qualification, express allegation of which is lacking, such as criminal intent, where acts might be criminal or innocent according to the intent or the element of force and against will; but we discover nothing omitted from the present information needing to be supplied. The statute makes no requirement of specific criminal intent other than necessarily inheres in ravishment by force and against the will of the sufferer, and all of that is expressly alleged. No other element of the crime occurs to us which could be added to the word "feloniously" and none is suggested. We are convinced that its absence does not affect the substantial rights of defendant,

and that, without it, the offense denounced by sec. 4381, Stats. 1898, is set forth with such degree of certainty that the court could pronounce judgment according to the right of the case, and that the defect, if such it be, is in mere matter of form not tending to the prejudice of the defendant. So that, under our statute, the information is sufficient without this word, however essential at common law or under other and different systems of criminal procedure.

4. Error is assigned upon the overruling of an objection to the question to the prosecutrix: "Was it against your will?" In this we think there was no error. Where a mere mental condition is material, the person whose intent is material is usually, if not universally, allowed to testify directly to the existence or nonexistence of such mental state; such evidence, of course, to be weighed with due regard to the ease of the statement and the difficulty of refutation. *Fischer v. State,* 101 Wis. 23, 26, 76 N. W. 594; *Milwaukee R. M. Co. v. Hamacek,* 115 Wis. 422, 91 N. W. 1010. Such question to the prosecutrix could properly mean no more than to inquire as to her mental state of willingness or unwillingness. Of course it would be improper by such a question to attempt to call for the conclusion of the witness as to whether the offense was against her will in the statutory sense that it was accomplished only by overcoming the utmost physical resistance of which she was capable; and, even if so understood by the jury, her mere conclusion upon such subject could not justify conviction unless confirmed by full proof of the acts constituting such resistance, as has already been pointed out in discussing the sufficiency of the evidence in this case.

5. Error is also assigned upon refusing to permit a physician called by the defendant to testify that the prosecutrix, at the time of her physical examination, stated to the witness that she made no resistance or fight. In such ruling there was no error: first, for the reason that the witness had already been allowed to answer the same question; but, as the subject

may be of importance upon another trial, we deem it proper to say that, independently of this reason, the ruling was correct. The prosecutrix was not a party so as to render her admissions competent evidence, and the only way in which such a statement of hers could be made admissible would be either, first, by laying a foundation for its reception as impeaching evidence; or, secondly, by the state first giving evidence of parts of the same transaction whereby the defendant might be entitled to prove the remainder. *State v. Shettleworth,* 18 Minn. 208, 215; *State v. Yocum,* 117 Mo. 622, 23 S. W. 765; *State v. Sudduth,* 52 S. C. 488, 490, 30 S. E. 408. We are clear, however, that the mere proof by the state of the fact of physical examination, without detailing any of the conversation, would not so open the door, except possibly for the purpose of narrating statements or conduct strictly *res gestæ* to the examination, such as expressions of present pain or bodily or mental condition. The subject inquired of by the rejected question related to nothing of the sort, but to past events. Of course such narrative on the following day could not be admissible as *res gestæ* of the offense itself.

6. Error is assigned upon refusal of a requested instruction to the effect that mere verbal protests and refusals would not suffice as resistance; and that, unless the jury found active physical resistance by prosecutrix, their verdict must be not guilty. Both of these propositions of law were correct, and, in a case of so much doubt, should have been impressed upon the jury clearly and unambiguously. The court, in its general charge, gave a correct abstract rule of law as to the necessity of both nonconsent and resistance, and, since there must be reversal on other grounds, we shall not deem necessary to decide whether such charge sufficiently met the request of defendant's counsel.

Complaint is made that, in his general charge, the court authorized conviction without full and continued resistance, if such resistance were overcome by fear. It is urged that,

while the rule of law is correct in a proper case, it tended here to mislead the jury by suggesting that they might find such situation and excuse in the facts of this case, whereas there was no evidence whatever of any threats or other facts to justify such finding. The argument might be of much force had exception been reserved to this portion of the charge, but, in absence of such exception, there can be no reversal on this ground.

Other assignments present nothing likely to arise upon a new trial and may be passed without discussion.

By the Court.—Judgment and sentence reversed, and cause remanded for a new trial.

SUFFEL, Trustee, Appellant, vs. MCCARTNEY NATIONAL BANK, Respondent.

January 10—February 23, 1906.

Bankruptcy: Preferential payments: Insolvency: Notice: Questions of fact.

1. When the creditor of one subsequently adjudicated a bankrupt receives a payment without reasonable cause to believe the debtor insolvent or that he intended thereby to give a preference, although the facts known to the creditor, at the time of the payment, were such as would naturally produce in the mind of a reasonably intelligent man a doubt or suspicion of solvency, and such as would put a reasonably prudent man on inquiry, such payment is not preferential.
2. Grounds for reasonable belief in a present inability of a debtor to pay debts in the course of business are not necessarily grounds for believing that his property, at a fair valuation, is not sufficient to pay his debts.
3. Whether the creditor of a bankrupt in receiving a payment had reasonable cause to believe that a preference was intended is a question of fact determinable by the jury or trial court.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

May 7, 1902, Charles F. Dickinson was adjudged a bankrupt, and the plaintiff was thereupon appointed trustee of his estate and qualified as such. July 3, 1902, the plaintiff, as such trustee, commenced this action to recover $1,350 alleged to have been paid to the defendant by Dickinson April 5, 1902, as a fraudulent preference. The defendant answered by way of admissions, denials, and counter allegations, among others to the effect that up to the time of such bankruptcy proceedings, May 7, 1902, the defendant and all its officers believed said Dickinson to be solvent and able to pay all his debts, and had no reason to believe otherwise, and that such payment by Dickinson to the defendant was received by this defendant in good faith and in the ordinary course of business and without any intention of securing a preference over his other creditors. A trial by jury having been waived and trial had, the court at the close thereof found as matters of fact: (1) That at the time Dickinson paid to the defendant the sums alleged in the complaint and admitted in the answer he was insolvent; (2) that the amount so paid by the defendant was a greater percentage on Dickinson's indebtedness than his estate will pay to other creditors, and was a preference; (3) that the cashier of the defendant bank, who transacted its business in regard to said debt and payment, did not, at the time of the payment, believe Dickinson to be insolvent, and none of the officers of the defendant bank then believed him insolvent; (4) that neither the cashier of the bank nor any of its officers, at the time said payment was made, had reasonable cause to believe Dickinson insolvent nor that it was intended by said payment to give preference to the defendant; (5) that the facts known to the cashier of the defendant bank, at the time of said payment, were such as would naturally produce in the mind of a reasonably intelligent man a doubt or suspicion of Dickinson's solvency, and were such as would put a reasonably prudent man upon inquiry, if the bankrupt law required the same diligence of creditors con-

cerning preferential payments that is required of grantees in cases of fraudulent conveyances. And as conclusions of law the court found that the plaintiff is not entitled to recover in this action and that the defendant is entitled to judgment dismissing the complaint upon its merits, and for costs. From the judgment entered in favor of the defendant in accordance with such findings, and for costs, the plaintiff appeals.

John A. Kittell and *Samuel H. Cady,* for the appellant.

C. W. Lomas, for the respondent.

CASSODAY, C. J. In reaching the conclusions mentioned in the foregoing statement the trial judge, in a lengthy and carefully prepared opinion, reviewed the evidence as to Dickinson's dealings with the bank during the three years immediately preceding such payment, and all facts tending to show what knowledge the cashier of the defendant, and its other officers, had acquired during those three years as to Dickinson's financial circumstances. It does not appear that Dickinson did business with any other bank during the three years mentioned. It appears from such summary, among other things, that Dickinson's business was selling musical instruments on long time, payable in instalments, secured by leases on the instruments sold; and that such business required a considerable capital in proportion to the volume of business, and so he obtained loans from the bank, giving such leases as collateral. As early as in 1899 the cashier of the bank was induced by Dickinson to believe that his father-in-law, who was a man of means and had done considerable for his two sons, had also advanced, as a gift to Dickinson's wife, $1,700. January 1, 1900, Dickinson submitted to the bank a statement showing his assets to be $8,003.86 and liabilities $2,791; and in January, 1901, he referred to the same statement as still showing his financial condition. In May, 1901, Dickinson borrowed from the bank $1,200, giving notes therefor with his father-in-law as joint maker; and he then told the cashier

that he wanted that amount to pay off all his indebtedness aside from what he owed the bank. The notes were not paid at maturity, but, as they were considered perfectly good, they were allowed to remain. January 1, 1902, Dickinson gave the bank an inventory of his stock, and a statement of his liabilities as being $2,000 aside from what he owed the bank. In the latter part of that month his entire stock of goods was destroyed by fire, and a few days later his household effects were destroyed by fire, but he held policies of insurance upon his stock of goods to the amount of $4,750, of which $3,250 was in companies represented by the defendant's cashier as agent, and $1,000 on his household effects, of which $500 was in a company then represented by the defendant's cashier, and the bank then held leases, as collateral, to the amount of $900, and, from what Dickinson told him, the cashier supposed he had quite an amount of other leases. About that time the cashier learned that he owed other indebtedness to the amount of at least $2,000, and that about March 29, 1902, some small claims were being pressed for payment, and some of his checks were unpaid for want of funds. Some time between the fires and March 29, 1902, the cashier inquired of Dickinson whether he intended to resume business and was told by Dickinson that he had about arranged with his creditors to pay them fifty per cent. of the amount due them at once, and that they would give him time to pay the balance. About March 29, 1902, the fire losses were adjusted and paid. The bank's claim against Dickinson was secured by notes on which his father-in-law was joint maker and regarded as perfectly good. Nevertheless the cashier asked Dickinson to take up the notes with the insurance money, but did not insist on such payment. Dickinson, however, offered to make payment, and so the same was paid April 5, 1902, as stated.

Such is a general outline of the evidence upon which the court, among other things, found, in effect, that at the time of making such payment neither the defendant's cashier nor any

of its officers believed Dickinson to be insolvent, nor had they or any of them, at that time, reasonable cause to believe him to be insolvent, nor that it was intended by said payment to give preference to the defendant. Such findings seem to have covered the issues in the case, and determined the same in favor of the defendant. But the court went further and found, in effect, that the facts known to the cashier, at the time of such payment, were such as would naturally produce in the mind of a reasonably intelligent man a doubt or suspicion of Dickinson's solvency, and were such as would put a reasonably prudent man upon inquiry, if the bankrupt law required the same diligence of creditors concerning preferential payments that is required of grantees in cases of fraudulent conveyances. The obvious meaning of this language, when construed in connection with the other findings mentioned, is that the court held, as a matter of law, that the present bankrupt act does not require the same diligence of creditors concerning preferential payments that is required of grantees in cases of fraudulent conveyances; and hence, that the facts known to the cashier at the time of receiving the payment, though sufficient to produce in his mind a doubt or suspicion of Dickinson's solvency, yet that they were insufficient to prove that the cashier had at the time reasonable cause to believe that Dickinson was then insolvent, or that in making such payment he intended to give a preference to the defendant. This is in harmony with the conclusion of the lengthy opinion of the trial judge, where he said, in effect, that the point to be decided was somewhat difficult, but a considerable reflection had led him to the conclusion that the knowledge of facts and circumstances possessed by the cashier was well calculated to produce a doubt or raise a suspicion in the mind of an ordinarily intelligent man as to Dickinson's solvency, but not such as was calculated to produce a *belief* of it; and as that was essential to the plaintiff's cause of action, he could not recover. Such findings of fact seem to be sustained by the evidence.

Are the conclusions of the trial court in accordance with the law applicable to the case? It was held by the supreme court of the United States under the bankrupt act of 1867:

"In order to invalidate, as a fraudulent preference within the meaning of the bankrupt act, a security taken for a debt, the creditor must have had such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency." *Grant v. National Bank,* 97 U. S. 80, 82.

Mr. Justice BRADLEY, speaking for the whole court, there said:

"Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

That case and that language were expressly sanctioned in *Barbour v. Priest,* 103 U. S. 293, 297. The same is true of a still later case where it was held:

"A creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or take security without necessarily violating the bankrupt law. When such creditor is unwilling to trust the debtor further, or feels anxious about his claim, the obtaining additional security or the receiving payment of the debt is not prohibited, if the belief which the act requires is wanting." *Stucky v. Masonic Sav. Bank,* 108 U. S. 74, 2 Sup. Ct. 219.

In considering the adjudications under the bankrupt act of March 2, 1867 (ch. 176, 14 U. S. Stats. at Large, 517), it should be observed that the words "insolvent" and "insolvency" contained in secs. 35 and 39 of that act (14 U. S. Stats. at Large, 534, 536) had a very different meaning than they have under the present bankrupt act. Thus it was held early under the bankrupt act of 1867:

"By insolvency, as used in the bankrupt act when applied to traders and merchants, is meant inability of a party to pay

his debts, as they become due, in the ordinary course of business." *Toof v. Martin,* 13 Wall. 40, 47; *Wager v. Hall,* 16 Wall. 584, 601.

The present bankrupt act declares:

"(15) A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, *at a fair valuation, be sufficient in amount to pay his debts.*" Act July 1, 1898, ch. 541, 30 U. S. Stats. at Large, 544, § 1, (15), 2 Supp. R. S. U. S. 844 [U. S. Comp. St. 1901, p. 3419].

To have reasonable cause to believe that a trader or merchant is unable to pay his debts as they become due in the ordinary course of business is a very different thing than to have reasonable cause to believe that the aggregate amount of the debtor's available property and assets is insufficient in amount, at a fair valuation, to pay his debts. This distinction is pointed out by Federal Judge LOWELL of Massachusetts in a very recent case, where it was held:

"Grounds for reasonable belief in the present inability of a debtor to pay his debts in the course of business are not necessarily grounds for believing that he is insolvent within the definition of insolvency contained in" the present bankrupt act "so as to require the creditor to surrender payments received as preferences." *In re Pettingill & Co.* 135 Fed. 218, 220.

It is there said by the court:

"Grounds for reasonable belief in a present inability to pay debts in the course of business are not necessarily grounds for believing that a man's property at a fair valuation is not sufficient to pay his debts."

In construing the clause of the bankrupt act here in question (sec. 60*b*, 30 U. S. Stats. at Large, 562 [U. S. Comp. St. 1901, p. 3445]), it has been held by the circuit court of appeals of this circuit, in an opinion by Judge JENKINS:

"In determining whether taking of security by a creditor constitutes an illegal preference . . . the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency. On the other hand, it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but it is sufficient if he has reasonable cause to *believe him insolvent.* If facts and circumstances with respect to the debtor's financial condition are brought home to him such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose." *In re Eggert,* 102 Fed. 735, 43 C. C. A. 1; *S. C.* 98 Fed. 843.

That case was cited with approval by this court in the recent case of *Jackman v. Eau Claire Nat. Bank,* 125 Wis. 465, 485, 104 N. W. 98, 105. As held in that case and the *Eggert Case,* the question whether in receiving the payment the defendant's cashier had reasonable cause to believe that a preference was intended was a question of fact determinable by the jury or trial court. *Kaufman v. Tredway,* 195 U. S. 271, 25 Sup. Ct. 33. We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

EMERSON and another, Respondents, vs. HUSS, Appellant.

January 12—February 23, 1906.

Courts: Terms: Review of adjudications: Criminal and civil contempts: Procedure.

1. A term for T. county which, under sec. 2424, Stats. 1898, as amended by ch. 6, Laws of 1905, is made a special term for P. county, is a separate term for P. county, commencing and ending as a term for P. county with the opening and closing of the term for T. county.

2. In such situation no judgment or final order in a special proceeding pending in P. county, but actually entered in T. county, can be reviewed at a term for A. county which is also a special term for P. county, and hence, except as provided by the statute authorizing the court to grant relief from a judgment or order or other proceeding made through mistake, inadvertence, surprise, or excusable neglect, an order entered in A. county, attempting to modify such order entered in T. county, is unauthorized, void, and of no effect.
3. There is a marked distinction in the remedies afforded and the procedure to be followed in each class between criminal contempts under ch. 117, Stats. 1898, and contempts in civil actions under ch. 150. The former have all the characteristics and incidents of a criminal prosecution in the name of the state, while the latter have those of a civil proceeding.
4. The proceedings to punish a civil contempt under ch. 150, Stats. 1898, are designed to enforce obedience to the decrees of the court, to indemnify parties to the action for their actual loss or injury, and to compel performance of duties still within the contemnor's power.
5. The provisions of ch. 150, Stats. 1898, governing civil contempts, warrant the imposition of a fine or imprisonment, or both, in cases where no actual loss or injury is shown; and when a fine is so imposed it is in the nature of a penalty, and is to be paid into the state treasury to the credit of the school fund.
6. In cases of civil contempts punishable under ch. 150, Stats. 1898, where actual loss or injury results from the alleged misconduct, *instead* of imposing a fine the proper proceeding is to order a sum to be paid to the aggrieved party to indemnify him for such loss or injury.
7. In proceedings supplemental to execution a judgment debtor, who was ordered to appear before a court commissioner to answer under oath as to his property and abide the orders of the commissioner, defaulted. Thereafter the commissioner made an order requiring the debtor to show cause before the circuit court why he should not be punished as for a contempt, and the debtor again defaulted. *Held*, that it then devolved upon the court to determine (1) whether the alleged misconduct had been committed; (2) if the debtor was found guilty, whether such misconduct was calculated to or actually did defeat, impede, or prejudice the rights and remedies of the judgment creditor; (3) if it was so found, whether an actual loss or injury had resulted to the judgment debtor from such misconduct; (4) if no resultant loss or injury was adjudged, to impose a fine or imprisonment, or both, as a punishment

for the contempt; (5) if resultant loss or injury was adjudged, to order the defendant to pay to the injured party a sum to indemnify him and to pay his costs and disbursements, and in addition, if a proper case, to coerce performance of acts and duties owing to the injured party, and still in the defendant's power to perform.

3. In such case the successive adjudication of each of the foregoing propositions was an essential and necessary step to give validity to the proceeding, and, in their absence, no foundation was shown for an order directing the judgment debtor to perform a duty theretofore omitted and still in his power to perform, to pay a fine, and in default to stand committed until the order should be obeyed.

APPEAL from orders of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Reversed.*

On August 17, 1903, an action was commenced in justice's court in Price county, and on August 24, 1903, judgment was rendered against the defendant. Thereafter a transcript of the judgment was duly filed in the office of the clerk of the circuit court for Price county. Execution issued and on December 23, 1903, was returned unsatisfied. One of the plaintiffs having died after the rendition of the judgment, the circuit court, upon proceedings, made an order reviving the action in the names of the proper parties. Thereafter the county judge of Price county, exercising the powers of court commissioner, made an order requiring the defendant in the action to appear at his office on August 16, 1904, to answer on oath concerning his property and to perform such acts as the court might deem proper to enforce the rights of the parties to the action. The defendant failed to appear as ordered, and on September 5, 1904, the county judge, as court commissioner of the circuit court for Price county, made an order requiring the defendant to show cause on September 7, 1904, at a special term of the circuit court for Price county, to be held at the courthouse in the city of Medford, Taylor county—this term was also a general term of the Taylor county circuit court,—why he should not be punished as for a

contempt for his misconduct in refusing and neglecting to appear and answer as ordered. Defendant failed to appear and the court made the following order:

"An order dated the 5th day of September, A. D. 1904, having been granted against the above-named defendant, requiring him to show cause on the 7th day of September, 1904, at this term, why he should not be punished for contempt for his alleged misconduct in refusing and neglecting to appear before the Hon. E. W. Murray, pursuant to an order duly served on him, and answer on oath concerning his property and to abide and perform such further and other order as by him made in the premises, and said *J. E. Huss,* defendant, having failed to appear before the court on date, and after hearing J. W. Hicks, attorney for the plaintiffs, and examination of the record of the proceedings before the county judge of Price county herein, and the affidavit of J. W. Hicks, attorney for the plaintiffs, and being advised in the premises, and the court having decided that defendant ought to appear and answer under oath touching his property and to abide by and perform such other and further order of the said county judge as shall be made in the premises, on motion of J. W. Hicks, attorney for the plaintiffs, it is:

"Ordered that said *J. E. Huss* do appear before the said E. W. Murray on the 17th day of September, 1904, at 2 o'clock p. m., at his office in the city of Phillips, and there make answer under oath touching his property; that there is hereby imposed upon said *J. E. Huss* a fine of $10, and the sum of $15 as costs of this proceeding, which said sums shall be paid on or before the 17th day of September, 1904; that in default of said payment and said appearance the said *J. E. Huss* shall from and after the said 17th day of September, 1904, stand committed to the county jail of Price county until the terms of the above order shall have been complied with.

"Dated this 7th day of September, 1904."

On September 19, 1904, defendant obtained an order from the circuit court for Price county requiring plaintiffs to show cause on October 1, 1904, at a special term thereof—this being a general term of the Ashland county circuit court—to be

held in the courthouse in the city of Ashland, why the order of September 7, 1904, should not be vacated and set aside. Proceedings to enforce the order of September 7, 1904, were also ordered stayed. On September 22, 1904, defendant was ordered by a court commissioner of the circuit court for Price county to show cause on September 24, 1904, at a special term of the Price county circuit court, at the courthouse in the city of Ashland, why the order of September 7th should not be enforced, and why the order of September 19th, staying the proceedings, should not be vacated, and why the plaintiffs should not recover their costs. The court ordered the two orders to show cause to be taken up together, and they were so heard. On November 28, 1904, the court made the following order:

"At a special term of said court, held in the courthouse in the city of Ashland, Ashland county, Wisconsin, on the 24th day of September, A. D. 1904. Present: Hon. JOHN K. PARISH.

"The motion of the defendant to set aside the order of this court dated September 7, 1904, vacating and holding for naught said order imposing a fine of $10 upon and requiring the defendant to pay $15 costs of said motion, and the order to show cause issued to the plaintiff, by G. D. Myers, court commissioner for Price county, Wisconsin, on the 22d day of September, 1904, ordering the defendant to show cause before the court why the defendant should not pay the sum of $10 fine and $15 costs of proceeding as commanded by order of this court dated September 7, 1904; and why the order dated September 19th staying proceedings herein to enforce said order of September 7th should not be vacated and set aside; and why the plaintiffs should not recover their costs of this proceeding; and why the defendant should not be further punished for his failure to comply with the terms of said order of September 7, 1904, by order of the court came on to be heard before the court on the said 24th day of September, 1904, and J. W. Hicks, attorney for the plaintiffs, appeared and made argument in support of the contentions of the plaintiffs, and G. E. Schwindt, attorney for the defendant, appeared and made argument in support of the contentions of

the defendant, and the attorneys for the respective parties thereafter submitted their briefs in the matter, and the court having duly considered all points involved, and being advised in the matter, finds as follows:

"Findings of Fact.

"That the defendant, *J. E. Huss,* is guilty of contempt in having failed and refused to appear before the Hon. E. W. Murray on the 16th day of August, A. D. 1904, pursuant to an order of said E. W. Murray dated on the 12th day of August, A. D. 1904, and duly served on the said *J. E. Huss,* as shown by proofs now on file herein, and there make answer under oath touching his property. That plaintiffs have suffered damages in the sum of $10 by the said failure of the said *J. E. Huss* to appear before the said E. W. Murray on the 16th day of August, 1904, and make answer under oath touching his said property. That the defendant, *J. E. Huss,* ought to appear before the said E. W. Murray, pursuant to order of this court, or order of said E. W. Murray, and there make answer under oath touching his property, and abide and perform such other and further order as shall be made herein. And it is hereby ordered that said order of September 7, 1904, be and the same is hereby modified so that it shall be and read as follows:

"Ordered, that within ten days from the date of service of notice of entry of this order on the defendant, *J. E. Huss,* he shall pay to J. W. Hicks, attorney for the plaintiffs, the sum of $25, being $10, their damages suffered by the failure of the said *J. E. Huss* to appear before the said E. W. Murray on the 16th day of August, 1904, and there make answer under oath touching his property, and $15, costs of the proceedings herein, dated on the 7th day of September, 1904. Further ordered, that the order herein staying proceedings to enforce the said order of September 7th be and the same is hereby vacated and set aside, and that the motion of the defendant herein to set aside the said order of September 7, 1904, is denied. Further ordered, that the said *J. E. Huss* shall on two days' notice, personally served on him by J. W. Hicks, attorney for the plaintiffs, and without further order or process, appear before the said E. W. Murray, county judge for Price county, and there make answer under oath touching his prop-

erty, and that he do further perform and abide such order as shall be made herein. Further ordered, that if the defendant, *J. E. Huss,* fails to pay the said sum of $25 as herein ordered within ten days from the date of service of entry of this order, the said *J. E. Huss* be imprisoned in the common jail of such county until the same be paid, not to exceed sixty days, or until further order of the court.

"Dated November 28, 1904."

This is an appeal from so much of the order of September 7, 1904, as imposes a fine upon defendant and orders his imprisonment in default of payment and his appearance before the court on September 17, 1904, and from the whole of the order of November 28, 1904.

G. E. Schwindt, for the appellant.

J. W. Hicks, for the respondents.

SIEBECKER, J. The proceedings upon which errors are assigned were instituted, under ch. 150, Stats. 1898, to punish the defendant as for a contempt for his neglect, or violation of duty, or misconduct, through which the rights and remedies of the judgment creditors in the action against him are alleged to have been impeded and prejudiced. The facts and circumstances of the alleged misconduct are set forth in the foregoing statement of facts. The course of the proceedings throughout the many different terms of the circuit court is not clearly presented in all particulars, but it appears sufficiently clear that the action was instituted against defendant in justice's court in Price county, that a transcript of a judgment in the action was filed in the office of the clerk of the circuit court for Price county, that execution issued and was returned wholly unsatisfied, and that the proceedings for defendant's examination were had as hereinbefore stated.

The first question arising is: Could the court by the order of November 28, 1904, review its adjudication made on September 7th? It appears that the court undertook to re-examine its adjudication of September 7th whereby it ordered the de-

fendant to appear and be examined as theretofore directed, to pay a fine, and in case of default in these matters to be imprisoned. It is manifest that the court attempted, by the punishment of the defendant as for a contempt, to enforce the same rights by the order of September 7, 1904, as by the adjudication of November 28th following, and that the adjudication in the latter order is a review of the former. This order of November 28th is attacked upon the ground that the court could not, at a term subsequent to the one at which the order was made, so review its adjudication of September 7th. The proceeding to examine defendant concerning his property was one pending and triable in the circuit court for Price county. The initial steps were taken before the county judge of Price county, exercising the powers of a court commissioner of the circuit court. The order of September 7th was made at a general term of the Taylor county circuit court, which, under the law, was a special term for the Price county circuit court, and the order of November 28th was made at a general term of the Ashland county circuit court, which was also a special term for the Price county circuit court. Under sec. 2424, Stats. 1898, as amended by ch. 6, Laws of 1905, each of these special terms of the Price county circuit court must be held to be a separate term of this court. *State ex rel. Ashland W. Co. v. Bardon,* 103 Wis. 297, 79 N. W. 226. They commence and end as terms of this court, respectively, with the opening and closing of the term in the county where they are actually held. Id. This made the term held in Ashland county a special term of the Price county circuit court and a subsequent term to the one held as a special term in Taylor county, and the order of November 28th, made at a session of the court in Ashland county as a special term of the Price county circuit court, was made at a term subsequent to the one at which the September 7th order was made. Since no judgment or final order in a special pro-

ceeding can be reviewed on its merits at a subsequent term of the court, except as provided by the statute authorizing the court to grant relief from a judgment or order or other proceeding made through mistake, inadvertence, surprise, or excusable neglect, we think it must follow that the order of November 28th was unauthorized, and hence void and of no effect. Sec. 2832, Stats. 1898; *Flanders v. Sherman,* 18 Wis. 575, 593; *Milwaukee Mut. L. & B. Soc. v. Jagodzinski,* 84 Wis. 35, 54 N. W. 102; *Pinger v. Vanclick,* 36 Wis. 141.

This leaves the order of September 7th operative as the final order in the proceeding. Its validity is assailed because it fails to comply with the provisions of the statutes providing for "proceedings to punish contempts to protect the rights of parties in civil actions." It is urged that the court erroneously by this order in the proceeding inflicted punishment on defendant as for a criminal contempt, and wrongfully and without adjudicating the questions involved imposed a fine for the alleged misconduct as for contempt in civil actions. The provisions of the statutes respecting the two classes of contempts, embodied in chs. 117 and 150, Stats. 1898, preserve a marked distinction in the remedies they afford and the procedure to be followed in each class. An examination of the decisions of this court involving these statutes shows a considerable contrariety of opinion as to their construction and scope, which it would be impracticable to set out in detail at this time. In their application of the statutes to the cases actually presented, with the exception of those specifically noted hereafter, the decisions rendered are in substantial harmony. There is substantial accord in the cases as to the infliction of penalties for criminal contempts under secs. 2565–2568, Stats. 1898. It is clear that the proceeding is to be prosecuted in the name of the state, either in a summary way or upon notice and inquiry; and, if it is adjudicated that the defendant is guilty of the alleged offense,

punishment by fine or imprisonment, or both, may be visited, within the limits provided, on the contemnor; and, if imprisonment is imposed, the commitment must specify the particular circumstances of the offense. There is no question but that the moneys paid as fines under such proceedings go to the school fund as in criminal prosecutions, and that if imprisonment be ordered it is a commitment as a punishment for a criminal offense. The following cases are illustrative of this class of contempts and the approved procedure for their punishment: *Haight v. Lucia,* 36 Wis. 355; *State ex rel. Mann v. Brophy,* 38 Wis. 413; *In re Murphey,* 39 Wis. 286; *State ex rel. Att'y Gen. v. Circuit Court,* 97 Wis. 1, 72 N. W. 193; *In re Savin,* 131 U. S. 267, 9 Sup. Ct. 699; *In re Chadwick,* 109 Mich. 588, 67 N. W. 1071.

In proceedings to punish as for a contempt under ch. 150, Stats. 1898, much confusion has arisen from attempts to restrict the scope of the statutes by limiting the remedy under them to an indemnity of the injured party in his private rights by a recovery of his money loss or injury, and by coercing performance of a duty unperformed, owing to the injured party, and still within the power of the contemnor to perform. It is true that no misconduct is punishable under the provisions of this chapter unless it appears that the rights or remedies of a party in an action or proceeding depending or triable in the court or before one of its commissioners may thereby be defeated, impaired, impeded, or prejudiced. The provisions, however, plainly authorize the court to punish by fine and imprisonment all acts of misconduct coming within them, though the misconduct may not pertain to the performance of a duty still within the power of the contemnor to perform, and though it may produce no actual loss or injury. The proceedings provided by these statutes seek to accomplish a twofold purpose: one, to enforce obedience of the decrees of the court; and the other, to indemnify parties to the action for their actual loss or injury and to compel the performance

of duties still within the contemnor's power. If no actual loss or injury is produced by the misconduct, then some penalty must be inflicted for the contumacious conduct which results in defeating, impeding, or prejudicing the rights or remedies of any party through disobedience of the court's lawful commands. No good reason is perceived why, in protecting the rights of parties in civil actions, a money penalty or imprisonment may not appropriately be visited on the offender in civil proceedings, even though it appears that no actual pecuniary loss has resulted to the parties. The means are certainly well adapted to accomplish the purpose of protecting private rights and enforcing the court's commands in respect thereto, and if any money paid by the contemnor as a penalty for his misconduct is not due the party whose rights have been impeded or prejudiced, because no pecuniary loss resulted to him, we perceive no good reason why it may not very properly be turned over to the school fund of the state, as contemplated by secs. 3495, 3496, Stats. 1898. We discover no force in the claim that this will result in a blending of proceedings to punish contempts in civil actions with those authorized for the punishment of contempts criminally. The two classes of proceedings seek to reach entirely different objects and are subject to wholly different procedures; the one having all the characteristics and incidents of a civil proceeding, while the other has those of a criminal prosecution in the name of the state.

This construction of the statutes results in a conflict with the observation made by this court in *In re Pierce,* 44 Wis. 411, 424, to the effect that the "fine" contemplated in the provisions as to civil contempts is the same as "indemnity," thus excluding the idea that a fine could be imposed as a penalty merely, in a proceeding to protect the rights of parties in a civil action. This conclusion was based on the ground that these statutes were taken from those of New York on the same subject, and that the word "fine" as there used was in-

tended to cover only indemnity. A comparison of the provisions of this chapter with those of New York shows a marked difference in their context and evident meaning. The New York statute reads: "If an actual loss or injury shall have been produced to any party by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party" [2 R. S. p. 557, pt. 3, tit. 13, § 21], while secs. 3489, 3490, Stats. 1898, provide that, if the party be guilty of the alleged misconduct, the court "shall proceed to impose a fine or to imprison him, or both, as the nature of the case shall require," and "if an actual loss or injury has been produced . . . the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him and to satisfy his costs and expenses, *instead* of imposing a fine." The difference in the meaning and intent of these statutes seems so obvious and clear that it will not permit of construction. We are constrained to hold that the opinion expressed in *In re Pierce, supra,* to the effect that "fine," as used in the various provisions of ch. 150, Stats. 1898, was intended to cover only the indemnity to the injured party, is erroneous and must be rejected; that the provisions of this chapter clearly warrant the imposition of a fine or imprisonment, or both, in cases where no actual loss or injury is shown; that in case of actual loss or injury resulting from the alleged misconduct, *instead* of imposing a fine, a sum is to be ordered paid to him to indemnify for such loss or injury; and when a fine is imposed it is in the nature of a penalty, which is to be paid into the state treasury to the credit of the school fund. *Poertner v. Russel,* 33 Wis. 193; *State ex rel. Mann v. Brophy,* 38 Wis. 413; *State ex rel. Lanning v. Lonsdale,* 48 Wis. 348, 4 N. W. 390; *In re Milburn,* 59 Wis. 24, 17 N. W. 965; *Cleveland v. Burnham,* 60 Wis. 16, 17 N. W. 126, 18 N. W. 190; *Smith v. Weeks,* 60 Wis. 94, 18 N. W. 778; *Wright v. Wright,* 74 Wis. 439, 43 N. W. 145; *In re Rosenberg,* 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *Warren v. Rosenberg,* 94 Wis. 523, 69 N. W. 339;

State ex rel. Meggett v. O'Neill, 104 Wis. 227, 80 N. W. 447; *In re Meggett,* 105 Wis. 291, 81 N. W. 419; *State ex rel. Rose v. Superior Court,* 105 Wis. 651, 81 N. W. 1046; *Jos. Schlitz B. Co. v. Washburn B. Asso.* 122 Wis. 515, 100 N. W. 832; Ralpalje, Contempts, § 21 *et seq.; Langdon v. Judges,* 76 Mich. 358, 43 N. W. 310; *Hendryx v. Fitzpatrick,* 19 Fed. 810.

Another objection suggested by appellant is that the order in question seeks to cover both a fine as for a criminal contempt and an indemnity for costs under the provisions of ch. 150, Stats. 1898. It is pertinent to observe that, as indicated by sec. 3480, Stats. 1898, and the succeeding sections, the procedure prescribed "to punish contempts to protect the rights of parties in civil actions," when committed out of the immediate presence of the court, is twofold in its character. The court may, in its discretion, in certain specified cases, and in all other cases upon proper showing must, either order the defendant to show cause before the court why he should not be punished, or issue an attachment to arrest and bring him before the court to answer for his misconduct. Under sec. 3481, Stats. 1898, the order to show cause can only be made in the court wherein the action or special proceeding is pending, and is equivalent to a notice of motion, and the court thenceforth proceeds as upon a motion in such action or special proceeding. But when no such order is made and an attachment is issued, then "it shall be deemed an original special proceeding against the accused in behalf of the state upon the relation of the complainant." It has been held that these courses of procedure are the same in form as proceedings in civil cases, while the proceedings under ch. 117, Stats. 1898, for the punishment of criminal contempts, are carried on from their inception as criminal prosecutions, with all the incidents of such actions, in the name of the state against the defendant. These forms aid in preserving the distinctions in prosecutions between the two classes of contempts and show

the legislative intent on the subject. The expression of the court in *Haight v. Lucia,* 36 Wis. 355, to the effect that a contempt proceeding is not to be entitled in the action out of which it arose seems at variance with many well-considered cases. This question was, however, set at rest by the enactment of sec. 3481, Stats. 1898, as a new section to the Revised Statutes of 1878, added subsequently to the decision in this case. Furthermore, the observation in the same case, to the effect that the injury sustained by a party through the alleged misconduct is not a material matter in any contempt proceeding, is not correct and must be held applicable only to proceedings to punish as for criminal contempts under ch. 117, Stats. 1898; because, as we have shown, in proceedings to punish contempts under ch. 150, Stats. 1898, the question of indemnity for the injury produced to another party must be considered, as the provisions of the chapter expressly enjoin an adjudication and recovery for such injury. In the instant case the proceeding upon which the order of September 7th was based was an order to show cause in the action after judgment in the same court. The defendant was in default. At this stage of the proceedings it devolved on the court to determine whether or not the alleged misconduct had been committed, and if the court found defendant guilty thereof it devolved upon the court to determine whether or not such "misconduct was calculated to or actually did defeat, impede, or prejudice the rights or remedies of any party in [the] action or proceeding," and if it is so found, then a determination must be made as to whether or not an actual loss or injury had resulted to any of the parties from such misconduct. If no such loss or injury resulted and it was so adjudged, then a fine or imprisonment must be imposed as punishment for the contempt, but if such loss or injury is adjudged to have resulted, then no fine or imprisonment could be imposed, but the court must order that defendant pay to the injured party a sum to indemnify him and to pay his costs and disburse-

ments. Secs. 3489, 3490, Stats. 1898. In addition to these penalties the court may in proper cases impose those provided in sec. 3491, Stats. 1898, and coerce performance of acts and duties still in the defendant's power to perform. The adjudication of these questions is essential and a necessary step to give validity to the proceeding. Secs. 3489, 3490, Stats. 1898; *State ex rel. Chappell v. Giles,* 10 Wis. 101; *Shannon v. State,* 18 Wis. 604; *In re Gill,* 20 Wis. 686; *Poertner v. Russel,* 33 Wis. 193; *Lamonte v. Pierce,* 34 Wis. 483; *Witter v. Lyon,* 34 Wis. 564; *Heymann v. Cunningham,* 51 Wis. 506, 8 N. W. 401; *McEvoy v. Gallagher,* 107 Wis. 331, 83 N. W. 633.

An examination of the record before us shows that the court made no such adjudication. The order directs that defendant perform a duty theretofore omitted and still in his power to perform, to pay a fine, and in default to stand committed until the order should be obeyed. The record fails to show any adjudication from which it can be ascertained that defendant was guilty of the alleged misconduct, and that the misconduct was calculated to or actually did defeat, impede, or prejudice the rights or the remedies of any of the parties; and there is nothing to show whether or not the alleged misconduct produced actual loss or injury. The fatality of this omission, under the provisions of the statutes, is manifest. If such a loss or injury was produced, then no fine or imprisonment could be imposed under sec. 3489, Stats. 1898, but a money indemnity only could be ordered under sec. 3490, Stats. 1898. Upon these considerations it necessarily follows that no foundation was shown upon which the orders appealed from could properly be made, and they must therefore be vacated and declared for naught.

By the Court.—The orders appealed from are reversed, and the proceeding is remanded with directions to proceed to a retrial of the issues involved in the hearing in which the order of September 7, 1904, was entered.

HIRTE, Respondent, vs. EASTERN WISCONSIN RAILWAY & LIGHT COMPANY, Appellant.

January 30—February 23, 1906.

Appeal and error: Verdict, when disturbed: Street railways: Negligence: Ejection of passenger: Evidence: Remarks by court: Prejudicial error: Instructions to jury: Excessive damages.

1. On appeal the ruling of the trial court refusing to set aside a verdict will only be reversed where there is no evidence to support it, or where, though there is some evidence in its support, still the great weight of the evidence is against it, and that weight is so reinforced by all the reasonable probabilities and inferences that it becomes overwhelming.
2. In an action against a street railway company to recover damages for negligence in forcibly ejecting a passenger while the car was in motion, the evidence, stated in the opinion, is *held* sufficient to show such negligence, and also to sustain an answer to a special question submitted to the jury as to the rate of speed of the car at the time the passenger was ejected.
3. In an action against a street railway company to recover damages for negligence in forcibly ejecting a passenger while the car was in motion, plaintiff's counsel, in attempting to show notice to the defendant's officers shortly after the injury, asked a question: "What did you say to Mr. G. about this trouble?" and, on objection being made, the court remarked: "You are seeking to show that you informed the company of the improper conduct of the conductor soon after the accident happened." *Held*, that the use of the word "improper," while ill advised, did not constitute prejudicial error, since it was patent from the record that the court simply meant "the conduct which you claim was improper," and therefore the jury could not have been misled.
4. In an action against a street railway company to recover damages for negligence in forcibly ejecting a passenger while the car was in motion, an instruction, in substance, that if the plaintiff was using profane and insulting language or was guilty of boisterous or riotous conduct on the car, or was threatening to assault the conductor, the conductor was justified in putting him off without using unnecessary force, is not ren-

dered erroneous by adding: "Provided the car had come to a standstill, but not if it was still in motion."

5. In such case requested instructions bearing on plaintiff's conduct, stated in the opinion, are *held* to be not well drawn, and, in so far as they state correct principles, to be fully and carefully covered by the general charge.
6. In an action against a street railway company to recover damages for negligence in forcibly ejecting a passenger while the car was in motion, the evidence, stated in the opinion, is *held* sufficient to justify a finding by the jury that an ulcer on plaintiff's leg was caused by the fall at the time of the ejection.
7. In such case the verdict is *held* not to be excessive.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an action to recover damages for gross negligence in forcibly ejecting the plaintiff from a street car while in motion. The evidence upon the trial showed that the plaintiff, a young man twenty-five years of age, was a passenger on one of the defendant's street cars in the city of Fond du Lac on the evening of September 21, 1903. The car was going in a northerly direction, and the plaintiff desired to get off at Lake Shore Drive; and an altercation occurred between plaintiff and the conductor of the car, one Judkins, before the car reached the plaintiff's destination. The evidence for the plaintiff tended to show that before the car stopped at Lake Shore Drive the conductor, Judkins, shoved or pushed the plaintiff off from the car while it was moving at the rate of five or six miles per hour, and that the plaintiff fell on his back and was injured. The defendant's evidence tended to show that the car had stopped at Lake Shore Drive, and that the plaintiff refused to get off, although that was his destination, and that thereupon the conductor took him by the collar and put him off, not using unnecessary force, and that after getting off the plaintiff stood for a moment and then fell down. There was some evidence that the plaintiff was partially intoxicated. No claim was made to recover punitory damages. In addition to a general verdict the court on its

own motion submitted two special questions to the jury, and the verdict, as returned, was as follows:

"We, the jury in the above-entitled action, find in favor of the plaintiff, *Eli Hirte,* and against the defendant, *Eastern Wisconsin Railway & Light Company,* and we assess the plaintiff's damages at the sum of one thousand six hundred ($1,600) dollars. First question: Was the car in motion at the time when plaintiff was pushed off from it by the conductor at Lake Shore Drive? If so, at what rate of speed was the car then moving? *Answer.* Yes; three to four miles per hour. Second question: Is the diseased condition of plaintiff's left leg the natural and probable consequence of an injury sustained by him by reason of having been pushed off from the car at Lake Shore Drive? *A.* Yes."

The defendant made the proper motions for nonsuit at the close of the plaintiff's evidence, also for the direction of a verdict at the close of the entire evidence, also for judgment for the defendant *non obstante,* also to change the answers of the verdict and render judgment thereon for the defendant, also to set aside the verdict and to grant a new trial; all of which motions being overruled, judgment was rendered for the plaintiff on the verdict, and the defendant appeals.

For the appellant there were briefs by *Maurice McKenna,* attorney, and *John I. Thompson,* of counsel, and oral argument by *Mr. McKenna.*

For the respondent there was a brief by *Husting & Husting,* and oral argument by *B. A. Husting.*

WINSLOW, J. The appellant strenuously claims that this court should set aside the verdict because it is against the clear preponderance of the evidence. This court does not set aside verdicts for that reason. This court will only reverse the ruling of the trial court refusing to set aside a verdict where there is no evidence to support the verdict, or where, "though there be some evidence in its support, still the great weight of the evidence is against it, and that weight is so reinforced by

all the reasonable probabilities and inferences that it becomes overwhelming." *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 91 N. W. 666. This is not such a case. While there was considerable evidence tending to show that the conductor did not recklessly push the plaintiff off from the car while in motion, there was much evidence tending to prove that such was the fact, and there are no physical facts which render the latter version of the occurrence incredible or against all the reasonable probabilities. Nor can it be said that the finding to the effect that the car was moving at the rate of three or four miles per hour is a mere conjecture, unsupported by any evidence. It is true that no witness testified to these exact figures, and that the only direct evidence on the point is by two or three witnesses that in their opinion the car was moving somewhere from five to ten miles per hour. This, however, was merely opinion evidence, and there was evidence in the case to the effect that the car moved twenty or twenty-five feet, or about a car length, after the plaintiff was put off, which evidence manifestly bore legitimately on the question of the rate of speed, and from which the jury might well conclude that the car was moving at a less rate of speed than that directly testified to by the witnesses.

The plaintiff attempted unsuccessfully, upon the trial, to show that notice was given to one of the defendant's officers shortly after the injury of the act of the conductor, and in course of this attempt the following question was asked of the plaintiff's father: "What did you say to Mr. Grover about this trouble?" Objection being made to this question the court said: "You are seeking to show that you informed the company of the improper conduct of the conductor soon after the accident happened?" To which question plaintiff's counsel answered in the affirmative. Defendant's counsel now contends that this characterization of the conductor's act as "improper" was calculated to impress the jury with the idea that the court was of opinion that the conductor's act was un-

justifiable, and that hence it was prejudicial error. The remark of the court was certainly ill advised. Great care should be taken by trial courts not to make any remark in the presence of the jury which can be construed as indicating the court's opinion upon a question of fact. We cannot think, however, that the use of the word "improper" in the question asked by the court could be reasonably construed by the jury as an indication of any conclusion of the trial court. The question was addressed only to plaintiff's counsel, who, of course, was at all times vigorously contending that the conductor's act was improper, and we think it was so patent that the court simply meant "the conduct which you claim was improper" that the jury could not have been misled by it.

The court carefully charged the jury, in substance, that if the plaintiff was using profane and insulting language or was guilty of boisterous or riotous conduct on the car, or was threatening to assault the conductor, then the conductor was justified in putting him off without using unnecessary force, providing the car had come to a standstill, but not if it was still in motion. Complaint is made because the court several times, in course of the charge, inserted this proviso, and reference is made to the *Bolin Case,* 108 Wis. 333, 84 N. W. 446, where it was held that there might be circumstances under which a railway company would not be obliged to wholly stop its train to require a wilful trespasser to leave it. The case manifestly has no application, and we are referred to no case where it is held that a passenger lawfully riding on a train or car, and not engaged in an assault, can be lawfully ejected while the train or car is in motion. The charge was manifestly right.

Complaint is also made because the court refused to give the following instruction, asked for by the defendant:

"A passenger on a street railway car is entitled to protection only so far as his own conduct merits it, and the defendant was not bound to protect him against the usual and

probable results of his own misbehavior, if, under all the evidence in the case, you find that the defendant was guilty of any."

This instruction is not well drawn and has little legitimate bearing on the evidence. So far as it states a correct principle it is fully and carefully covered by the general charge. The same remark applies to the remaining requests for instructions made by the defendant which were refused by the court.

It is further claimed that the damages were excessive, and this claim is based largely upon the contention that the evidence was not sufficient to entitle the jury to find that the diseased condition of the plaintiff's left leg was proximately caused by the ejection from the car. It appears that at some time after the occurrence a traumatic ulcer developed on the plaintiff's left leg, which became serious and necessitated an operation upon the leg and the treatment thereof for ten weeks in a hospital, besides incapacitating him from labor of any kind up to the time of the trial, which occurred in March, 1905. The testimony as to the exact time when this ulcer developed is in some confusion. There is, it is true, evidence tending to show that it did not develop until some three months after the ejection from the car, and some of the plaintiff's own evidence seems to indicate that such was the case. However, he also says that there was pain at the place since the day of his ejection, and the attending physician testifies directly that a few days after the occurrence the left leg became swollen from knee to ankle, that inflammation set in in a week or ten days after that, and increased until it broke out and became an ulcer, and that he continuously dressed and treated it until it became an open sore and an operation became necessary. As it was an undisputed fact that the ulcer was traumatic in its origin, and that the plaintiff was in bed from the time of the ejection from the car for a considerable time, we think there was sufficient evidence upon which the

jury might find that the ulcer was caused by the fall at the time of the ejection. If such was the case, the damages cannot be held excessive.

By the Court.—Judgment affirmed.

MARSHALL and KERWIN, JJ., dissent.

THE STATE EX REL. SCHUTZ VS. WILLIAMS, Circuit Judge.

January 30—February 23, 1906.

Mandamus: *Criminal law and practice: Change of venue after reversal in supreme court: Statutes: Construction.*

S., being about to be placed on trial for a criminal offense in the municipal court of Milwaukee county, used his statutory right and obtained a change of venue to the circuit court for that county on account of the prejudice of the municipal judge. Thereafter, in due form of law, he was convicted and sentenced, and, upon writ of error, the judgment of conviction was reversed by the supreme court and the cause remanded for a new trial. At the first term after reversal and on the cause being called for trial, an application, in due form of law, was made for a change of venue on account of the prejudice of the circuit judge, which was denied, and thereupon an alternative writ of *mandamus* was sued out of the supreme court to compel the relief demanded on such application. *Held*, under sec. 4680, Stats. 1898 (providing that any defendant may apply for a change of venue on account of the prejudice of the judge of the court in the manner provided by law for a change of venue in civil actions; and it shall be the duty of the judge to award such change, but not more than one change shall be awarded in any cause, and such change shall not be awarded after the next term succeeding that at which the accused shall have been arraigned unless his affidavit states facts showing the existence of prejudice on the part of the judge unknown to the defendant at any term of the court prior to the making and filing of such affidavit; and in all cases after a trial shall have been had without a verdict the accused shall be entitled to one

change of venue, if he desire it and make application therefor at the term at which such trial was had; provided, that where the judgment shall be reversed by the supreme court and the cause remanded for a new trial such defendant may apply for a change of venue on account of the prejudice of the judge in the manner provided by this section at the first term when the cause shall be called for trial after such reversal):

(1) The right of S. to make such application by necessary implication carried with it the right to have the application granted in case the moving papers satisfied the statute.

(2) Such application should be made in accordance with the law in a civil action, *i. e.* by filing an affidavit and moving thereon, stating that the defendant has good reason to believe and does believe that he cannot have a fair trial on account of the prejudice of the judge, naming him.

(3) The manifest purpose of the proviso in sec. 4680 is to place the accused at the first term of the court after the reversal at which a trial may be had in the same situation, as regards a change of venue, as at the first opportunity for a change after the filing of the indictment or information.

(4) In such affidavit it is not necessary to state facts showing that the existence of prejudice on the part of the judge was unknown to the applicant at any term of court prior to the filing of the application, since there might be one or more terms of court prior to making the application, occurring between the first trial and the first opportunity for a second trial, neither of which would afford opportunity for an application for a change of venue and give rise to any necessity therefor.

(5) S. having been denied a clear statutory right, a peremptory writ of *mandamus* should issue.

MANDAMUS to OREN T. WILLIAMS, Judge of the Circuit Court for Milwaukee county. *Peremptory writ granted.*

Jacob Schutz, being about for the first time to be placed on trial in the municipal court of Milwaukee county, Hon. ALVIN C. BRAZEE presiding, for the offense of bribery, used his statutory right to obtain a change of venue on account of the prejudice, as he claimed, of such judge, resulting in the cause being transferred for trial to the circuit court for Milwaukee county. Such proceedings were duly had in such court that in due form of law he was found guilty, and was

sentenced to be punished by imprisonment at hard labor for the term of one year in the house of correction in Milwaukee county. Upon a writ of error sued out of this court the judgment against him was reversed and the cause remanded to the circuit court for a new trial. At the January term of such court for 1906 the cause was first, after such reversal, called for trial before the *Hon. Orren T. Williams,* the judge who presided at the previous trial, whereupon, in due form of law, an application for a change of venue was made, as in case of a first application, on account of prejudice, as the accused claimed, of said *Hon. Orren T. Williams.* The motion was denied. An alternative writ of *mandamus* was thereupon sued out of this court for the purpose of obtaining relief to which the accused deemed himself entitled, as indicated by his said motion.

For the relator there was a brief by *C. A. A. McGee* and *Julius E. Roehr,* attorneys, and *McGee & Jeger,* of counsel, and oral argument by *Mr. McGee.*

The *Attorney General* and *A. C. Titus,* assistant attorney general, for the respondent.

MARSHALL, J. The questions for decision are these: A person, charged with having committed a criminal offense, having obtained one change of venue in due form of law and thereafter been tried and convicted and subsequently secured a reversal of the conviction on writ of error to this court and a remand of the cause for a new trial, can he upon the cause being first called for such trial obtain, as matter of right, a second change of venue? If that be answered in the affirmative, is it requisite in the moving affidavit to show that the cause for the change was not known to the accused at any term of court prior to the filing of such affidavit? Both questions must be answered by the statute without effort to judicially construe the same, unless there is some ambiguity therein. Such statute (sec. 4680, Stats. 1898), eliminating

all words not helpful in determining its meaning, is as follows:

"Any defendant . . . may apply for a change of venue on account of the prejudice of the judge of the court . . . in the manner provided by law for a change of venue in civil actions; and it shall be the duty of the judge . . . to award such change, but not more than one change . . . shall be awarded in any cause, and such change shall not be awarded after the next term succeeding that at which the accused shall have been arraigned unless his affidavit states facts showing the existence of prejudice on the part of the judge unknown to the defendant at any term of the court prior to the making and filing of such affidavit; and in all cases after a trial shall have been had without a verdict the accused shall be entitled to one change of venue, if he desire it and make application therefor at the term at which such trial was had; provided, that where the judgment . . . shall be reversed by the supreme court and the cause remanded for a new trial such defendant may apply for a change of venue on account of the prejudice of the judge in the manner provided by this section at the first term when the cause shall be called for trial after such reversal."

That seems plain. There certainly is no uncertainty of sense in the words themselves. We cannot discover any in applying them to the subject with which they deal. In their literal sense they lead to no absurd consequences. We must, therefore, give thereto the plain ordinary meaning. *State ex rel. Davis & Starr L. Co. v. Pors,* 107 Wis. 420, 83 N. W. 706.

The right after reversal to make one application for a change of venue is stated in the most unmistakable language. The right to make application, by necessary implication, carries with it the right to have the application granted in case of the moving papers satisfying the statute. What is the essential in that regard? That is answered by the words of the proviso: "In the manner provided by this section." That refers to preceding language to the effect that, on the occasion

when the statute affords the first opportunity for a change of venue, the accused may make application therefor in accordance with the law in civil action, *i. e.* by filing an affidavit and moving thereon, stating that the defendant has good reason to believe and does believe that he cannot have a fair trial on account of the prejudice of the judge, naming him. The manifest purpose of the proviso, it seems, is to place the accused at the first term of the court after the reversal at which a trial may be had in the same situation, as regards a change of venue, as at the first opportunity for a change after the filing of the indictment or of the information. That it has nothing to do with the preceding proviso is unmistakable since that requires an affidavit stating facts showing the existence of prejudice on the part of the judge unknown to the applicant at any term of court prior to the filing of the application. In any case there might be one or more terms of court prior to the making of the application, occurring between the first trial and the first opportunity for a second trial, neither of which would afford an opportunity for an application for a change of venue and give rise to any necessity therefor.

The proviso with the words in connection with it which are a part thereof by reference or necessary implication is in this form: Where the judgment against a defendant shall be reversed by the supreme court and the cause remanded for a new trial such defendant may apply for a change of venue (and the same shall be awarded to him) upon his filing his affidavit that he has good reason to and does believe that he cannot have a fair trial in such action on account of the prejudice of the judge, naming him. That, of course, being subject to the provision in respect to holding the case and calling in another judge.

It follows that respondent denied the relator that which was his clear statutory right and for that reason a peremptory writ of *mandamus* must be issued according to law in such cases.

By the Court.—So ordered.

IN RE HARRINGTON.

January 30—February 23, 1906.

Habeas corpus: *Constitutional law: Sentence to state reformatory: Transfer to state prison by board of control: Judicial powers.*

Sec. 4944c, Stats. 1898, as amended by ch. 28, Laws of 1899, authorizing the board of control, under certain circumstances, to transfer convicts from the state reformatory to the state prison, is not a conferring of judicial power on the board of control, which, by the constitution, is confined to courts.

APPLICATION for a writ of *habeas corpus. Denied.*

Original writ of *habeas corpus* sued out to discharge petitioner from custody by the warden of the state's prison. On May 8, 1903, he was convicted of crime and sentenced to an indeterminate term of one to seven years at the reformatory at Green Bay. About November 23, 1905, he was transferred to the Wisconsin state prison at Waupun by an order of the state board of control, on the ground that it appeared to said board that said *Harrington* belonged to class 1, as defined by sec. 4944c, Stats. 1898, as amended by ch. 28, Laws of 1899, and that his continued presence in the reformatory was detrimental to the other inmates thereof, under which order he is now held. A return being made disclosing these facts, the case was heard thereon.

For the petitioner there was a brief by *Morse & Johnson,* and oral argument by *R. L. Morse.*

For the respondent there was a brief by the *Attorney General,* and oral argument by *A. C. Titus,* assistant attorney general.

DODGE, J. The petitioner seeks to assail the constitutionality of our recent statutes authorizing the indeterminate sentence and the transfer of prisoners upon the order of the board of control. He waives discussion of the constitutionality of the portion of those statutes authorizing an indeterminate

sentence, in deference to *In re Schuster,* 82 Wis. 610, 52 N. W. 757, holding that such question would be reviewable upon writ of error to the conviction and sentence and, therefore, is not upon writ of *habeas corpus.* He, however, seeks consideration of the question whether the authority given to the board of control is a conferring of judicial power, which, by the constitution, is confined to courts. This subject is fully considered and decided in *In re Linden,* 112 Wis. 523, 88 N. W. 645, which is decisive against the contention of the petitioner.

By the Court.—The petitioner is remanded to the custody of the warden of the state prison, to be held as before the writ issued.

MIDLAND LINSEED COMPANY, Appellant, vs. REMINGTON DRUG COMPANY, Respondent.

January 31—February 23, 1906.

Sales: Contracts: Variation by parol.

1. A memorandum signed by the seller and accepted by the buyer, reciting confirmation of a sale by an agent of sixty barrels of linseed oil at a named price f. o. b. Milwaukee, shipment at buyer's option during the months of November to July inclusive, terms thirty days net or less one per cent. for cash in ten days from invoice date, and that it was understood that the buyer would call for about equal quantities per month, has all the essentials of a contract, and, in the absence of any claim of fraud or ambiguity, evidence of the circumstances under which the contract was made is not admissible to aid the court in construing it.
2. In an action on such contract it is error to allow evidence as to what occurred between the seller's agent and the buyer prior to and contemporaneous with the making of the contract.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

Action to recover for breach of contract.

The complaint of the plaintiff was to this effect: Its agent took an order from defendant for a sale and delivery by it of sixty barrels of linseed oil at forty-three cents per gallon for boiled oil and forty-two cents for raw oil, the order being accompanied by some verbal arrangement between defendant and such agent. The order was sent to the plaintiff, by whom the arrangement, so far as it desired to approve the same, was reduced to writing in duplicate and signed, both papers being then sent to the defendant to be signed, if satisfactory, and one to be then retained by him and the other returned. The papers were signed, and one retained and the other returned accordingly. It was in these words:

"Sept. 24, 1902.

"*Remington Drug Company, Fond du Lac, Wis.*

"GENTLEMEN: We confirm sale to you through Mr. J. M. Mollerus of 60 barrels of pure old process linseed oil at 42 cents per gallon for raw and 43 cents for boiled f. o. b. Milwaukee, for shipment as you may want it during the months of November to July, inclusive. Terms 30 days net or less 1 per cent. for cash in ten days from invoice date. Shipment will be made as you may want it, but it is understood you will call for about equal quantities per month.

"Please sign enclosed copy of letter for our files.

"Thanking you for the order, we are,

"Yours truly,

"MIDLAND LINSEED COMPANY.

"Accepted.

"REMINGTON DRUG COMPANY, L. J. R."

Plaintiff performed the conditions of the contract on its part, except in so far as it was prevented from so doing by defendant. The defendant breached the contract by refusing to take more than thirty-one barrels of the oil. After defendant's refusal to take the twenty-nine barrels plaintiff sold the same at the market value, realizing, after deducting $17.50, necessary storage charges and insurance expense, $177 less than the agreed price.

The answer of the defendant was to the effect that at the time the order for the oil was given it was orally agreed between him and the agent that plaintiff would resell one half the oil so that defendant's obligation could be discharged by payment for thirty barrels; that such agreement was embodied in the order; that thereafter at the request of the agent defendant consented to the shipment of sixty barrels of oil through him to Worcester & Jones, at Wautoma, such shipment to include the thirty barrels of oil to be paid for by him; that shipment was made accordingly; and that defendant paid plaintiff for thirty barrels of oil and five barrels additional.

On the trial a written contract, as alleged by plaintiff, was established, the same being produced and received in evidence. Proof was also made of the other allegations of the complaint. On defendant's part, under objection, evidence was permitted to support his answer as to the resale of thirty barrels of oil. Evidence was also permitted, under objection, to the effect that when the contract was signed there was a verbal understanding between defendant and plaintiff's agent as to such resale. No proof was made to the effect that subsequent to the making of the contract it was modified by parol, or that there was any arrangement made for a discharge thereof by a shipment of sixty barrels of oil to Worcester & Jones through the defendant, he taking and paying for thirty barrels thereof, or that it was so discharged.

The verdict of the jury was for the defendant.

For the appellant there was a brief by *N. P. Christiansen*, attorney, and *Phillips & Hicks*, of counsel, and oral argument by *Mr. Christiansen*.

For the respondent there was a brief by *Doyle & Hardgrove*, and oral argument by *T. L. Doyle*.

MARSHALL, J. It seems clear that the verdict was based mainly on evidence as to what was said at the time the order for the oil was given, respecting what such order in fact con-

tained, and what was said at the time the contract was signed. We need spend no time discussing the question of whether the paper referred to as a contract was such in fact. That does not admit of any reasonable controversy. It has all the essentials of a contract, and was signed as and for such by both parties. No claim of fraud was made by the complaint or evidence, nor was any claim made that the contract was ambiguous. So there was no basis whatever for evidence of the circumstances under which the contract was made to aid the court in construing it. The allowance of evidence as to what occurred between the agent and respondent prior to and contemporaneous with the making thereof regarding a resale of part of the oil, was a plain violation of the very familiar rule of evidence precluding any contradiction of a written contract by parol. For that reason the judgment must be reversed and a new trial ordered.

By the Court.—So ordered.

BOWE and another, Respondents, vs. GAGE and another, Appellants.

January 31—February 23, 1906.

Brokers: Commissions, when earned: Sale by principal: Nonsuit: Direction of verdict: Compromise and settlement: Fraud: Misrepresentation of material facts: Repudiation: Tender of money paid: Instructions to jury: Trial: Reading from opinion of supreme court: Deceit: Special verdict.

1. Under a contract to pay a broker, for his services in endeavoring to effect a sale, two per cent. of the price for which the property should be sold to any customer produced by him, the broker earns his commissions if he produces a purchaser to whom the principal in fact sells.
2. Where there is evidence tending to prove the making of a contract to pay a broker, for his services in endeavoring to effect

a sale, a certain percentage of the price for which the property should be sold to any customer produced by him, and also of the production of a purchaser to whom a sale was in fact made, in an action to recover commissions it is not error to refuse a nonsuit or to refuse to direct a verdict for defendant.

3. A real-estate broker employed to procure a purchaser, after expending considerable effort to obtain a possible purchaser, on representation by the principal that he had decided to keep the land and not sell it, was induced to accept a small sum in full for his services. The principal, however, at once proceeded to sell to the very customer brought to his notice by the broker. *Held*, that the statement that the principal had decided to keep the land and not sell it was a false representation of an existing fact, although depending on the principal's mental state.

4. In such case the broker was entitled to retain the money paid, subject only to an equity in favor of the principal that, if the broker showed himself entitled to payment according to the contract of employment by reason of completed performance thereof, such payment should be applied thereon, and where such application is offered by the complaint and made by the judgment, it is, in practical effect, a return of the money to the principal.

5. The whole doctrine of refund upon repudiation of a contract of settlement is, not technical, but equitable, and requires merely that practical rights of the other party shall not be thereby prejudiced; that he shall be no worse off than if he had never made the contract of settlement.

6. Application of money paid on a void settlement to an actual existing debt due from the payor entirely satisfies all requirements of refunding or tender as a prerequisite to denying a settlement on the ground of fraud.

7. Instructions to the jury on the *quantum* and character of evidence necessary to warrant a finding of fraud inducing a settlement, merely cautioning them that they are to find fraud only if they are "satisfied by a preponderance of the evidence," in the face of requests for instructions that, notwithstanding a mere preponderance of evidence, the finding of fraud should not be made unless the jury were satisfied by evidence that was clear, satisfactory, and convincing, are erroneous, since it is only upon evidence that is clear and satisfactory that an affirmative finding of fraud can properly be made.

8. The practice of counsel to request and trial judges to read to juries passages from opinions of the supreme court is unwise, and usually improper if it goes beyond a mere statement of a rule of law.

9. In an action by a real-estate broker to recover commissions, an instruction that "When a sale is effected through the efforts of a real-estate agent or through information derived from him so that he may be regarded as the procuring cause, his services are regarded in the law as highly meritorious and beneficial and the law leans to that construction which will best secure the payment of his commission rather than the contrary," is erroneous.

10. In an action for deceit the sole question is whether the misrepresentation in fact deceived the party involved and materially affected his conduct. Effectiveness of deceit is to be tested by its actual influence on the person deceived, not by its probable weight upon another, and hence, in such action, it is not error to refuse to submit as part of a special verdict a question as to whether the misrepresentations were sufficient to influence the conduct of a person of ordinary intelligence.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

The defendants, being interested in a farm in Fond du Lac county, entered into an agreement with the plaintiffs, real-estate agents, to the effect, as found by the jury, that, if plaintiffs should effect a sale or procure a purchaser at a price acceptable to the defendants, the latter would pay plaintiffs a two per cent. commission on the price obtained. Eighteen thousand dollars was stated as the price which defendants desired or demanded. Plaintiffs made various exertions to make sale, reported several offers, which were unsatisfactory, and at length, about January 28, 1903, obtained and communicated offer from one Ferber of $17,000, which was rejected by defendants as inadequate, and negotiations by plaintiffs continued. On February 20, 1903, defendant *Gage* came to plaintiffs and stated to them that he had bought the farm from the other co-owners and that they felt like paying the plaintiffs something, although they had not earned their commission according to contract. Plaintiffs responded that they were still hopeful of effecting a sale to Ferber at a satisfactory price; whereupon *Gage,* as found by the jury, repeated to

plaintiffs that he had decided and intended to keep the farm as a home for himself and not to sell it; that it was no longer in the market; whereupon the plaintiffs said that, if he had so decided, they would forego any claim to continue efforts to find and effect a sale, and accepted his offer to pay them $25 for what they had done, and gave a receipt in full for all their services in that connection. At the moment of such negotiation defendant *Gage* had not determined or decided to withdraw said farm from the market or to keep it, but was on his way to see the same man Ferber with the then present intent to sell to him if a satisfactory price could be obtained. The following day he did effect such sale for $17,356, upon learning which the plaintiffs demanded payment of their commission of two per cent. on that amount, less the $25 received by them, which they credited thereon; that being refused, they brought this action to recover that amount. A special verdict was found, substantially to the foregoing effect, whereupon judgment was entered in favor of the plaintiffs for $365.38 and costs, from which defendants appeal.

For the appellants there was a brief by *Doyle & Hardgrove*, and oral argument by *T. L. Doyle*.

For the respondents there was a brief by *Duffy & McCrory*, and oral argument by *W. H. McCrory*.

DODGE, J. 1. The sufficiency of the complaint to state a cause of action is assailed. Appellants' argument upon this subject, as also upon sufficiency of the proofs, is pervaded by an assumption that the agreement was to pay commission only in case plaintiffs found a customer ready and willing to pay $18,000. Such assumption is not supported by the complaint and is negatived by the verdict. The one alleges, and the latter finds, a contract to pay plaintiffs for their services in endeavoring to effect sale two per cent. of the price for which the farm should be sold to any customer produced by them. This is substantially the contract dealt with in *Stewart v.*

Mather, 32 Wis. 344, where it was held that the broker earns his commissions if he produces a purchaser to whom the principal in fact sells. *Willey v. Rutherford,* 108 Wis. 35, 84 N. W. 14; *Terry v. Reynolds,* 111 Wis. 122, 86 N. W. 557; *Edward H. Everett Co. v. Cumberland Glass Mfg. Co.* 112 Wis. 544, 88 N. W. 597. We may also say in this connection that we find evidence tending to prove the making of such contract, as also the production of the purchaser to whom the sale was made; hence there was no ground for nonsuit or direction of verdict on that theory, as also contended by appellants.

Appellants also urge, in support alike of demurrer *ore tenus* and motions for nonsuit and direction of verdict, that the accord and satisfaction is not impeached, first, because no misrepresentations of any existing fact are alleged or proved, and, second, because no return of the $25 paid on said settlement was ever made or tendered. In discussing the first ground appellants seek to treat *Gage's* declarations to plaintiffs that he had decided to keep the farm and not to sell it as a mere promise now sought to be added to the written agreement then made. This is a misconception. It was the statement of an existing fact, albeit depending on defendants' mental state. If they had in fact withdrawn the property from sale, as they had right to do, all prospect for earning commission as result of the work plaintiffs had already done was at an end, and the latter would naturally be induced to accept anything they could obtain and release defendants from the mere moral obligation resting upon them. The complaint alleges and the verdict finds representation of such an existing mental determination. By undisputed evidence it is shown that it did not exist, but, on the contrary, *Gage* then had the present intention to proceed at once to efforts to sell to the very customer brought to his notice by plaintiffs. We cannot doubt that false representation of an existing material fact was alleged and supported by some evidence.

Upon the question whether the conceded failure to either

return or tender back the $25 paid precluded plaintiffs from denying the validity of the settlement on the ground of fraud, the decisions of this court leave little doubt, especially when set up by way of defense. *Leslie v. Keepers,* 68 Wis. 123, 31 N. W. 486; *Davis & Rankin Bldg. & Mfg. Co. v. Riverside B. & C. Co.* 84 Wis. 262, 268, 54 N. W. 506; *Friend Bros. C. Co. v. Hulbert,* 98 Wis. 183, 73 N. W. 784; *Gay v. D. M. Osborne & Co.* 102 Wis. 641, 78 N. W. 1079; *Bostwick v. Mut. Life Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Fosha v. O'Donnell,* 120 Wis. 336, 345, 97 N. W. 924. The settlement was, in any event, valid and binding upon defendants so that plaintiffs were entitled to retain the money, subject only to an equity in favor of defendants that, if plaintiffs showed themselves entitled to payment according to the terms of the contract of employment by reason of completed performance thereof, such payment should be applied thereon since it had been paid as compensation for part of the same services. Such application was offered by the complaint and made by the judgment. This was in practical effect a return of the money to the defendants, for it was applied, to their benefit, upon a debt which the jury has found that they owed. This entirely satisfied the rule of the above decisions holding that the whole doctrine of refund upon repudiation of a contract of settlement is, not technical, but equitable, and requires merely that the practical rights of the other party shall not thereby be prejudiced; that he shall be no worse off than if he had never made the contract of settlement. Under this principle, application of money paid on a void settlement to an actual existing debt due from the payor entirely satisfies all requirements.

2. Error is assigned upon the rule of law adopted by the court and communicated to the jury as to the *quantum* and character of evidence necessary to warrant a finding of fraud, inducing the settlement and receipt. The charge merely cautioned the jury that they were to find such fraud only if they

were "satisfied by a preponderance of the evidence" that it occurred; and this, too, in face of a request for further instruction that, notwithstanding a mere preponderance of evidence, the finding of fraud should not be made unless the jury were satisfied by evidence that is clear, satisfactory, and convincing. It is well settled that certain facts including fraud, mistake, and the like are not to be found as readily as the affirmative of ordinary issues not involving turpitude, or the repudiation of deliberate and formal writings, and while the doctrine earlier declared, that the evidence must establish such facts beyond reasonable doubt, has been abandoned, it is held that only upon evidence that is clear and satisfactory can an affirmative finding of fraud properly be made. A court, in submitting the issue of fraud to a jury, does not perform its duty without instruction marking this distinction. *Parker v. Hull,* 71 Wis. 368, 37 N. W. 351; *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 52, 71 N. W. 69; *Shaw v. Gilbert,* 111 Wis. 165, 188, 86 N. W. 188; *Klipstein v. Raschein,* 117 Wis. 248, 252, 94 N. W. 63; *Richmond v. Smith,* 117 Wis. 290, 293, 94 N. W. 35; *Harrigan v. Gilchrist,* 121 Wis. 127, 425, 99 N. W. 909. The instruction given would correctly enough have defined the jury's duty upon an ordinary issue of fact (*Anderson v. Chicago B. Co., post,* p. 273, 106 N. W. 1077); but it was incomplete as a guide in passing upon fraud, and the failure to add the proper qualification when requested so to do must be held error.

3. Error is assigned upon an instruction upon the question relating to the terms of the employment:

"I will instruct you further in connection with this question that where a sale is effected through the efforts of a real-estate agent or through information derived from him so that he may be said to be the procuring cause, his services are regarded in law as highly meritorious and beneficial and the law leans to that construction which will best secure the payment of his commission rather than the contrary."

This is quotation of a somewhat rhetorical and argumentative statement by DIXON, C. J., of not alone a rule of law, but reasons therefor, in *Stewart v. Mather,* 32 Wis. 344, 350. It is an apt illustration of a tendency in counsel to request, and in trial judges to read to juries, passages from opinions which it is hoped will convey a favorable impression. The practice is unwise, and usually improper if it goes beyond a mere statement of a rule of law. The duty of the trial court is performed when he communicates the rule which should guide the jury without stating the reasons which support it, or quoting comments approving or derogatory to those who obey or infringe. It was improper to suggest to the jury in this case that real-estate agents are more meritorious or entitled to any more favor than people in other walks of life. Yet such must be the effect of the instruction now under criticism. For no other reason was it suggested to the trial court. At most, it was proper to inform the jury that if the contract, as they found it to have been expressed between the parties, was ambiguous, they should favor a construction which would justify an affirmative answer to the second question of the special verdict, namely, whether the agreement was to pay commission upon procurement of a customer at an acceptable price. Even that would not be proper unless the construction of the contract was open to the jury by reason of ambiguity in language or conflict of evidence as to extrinsic facts tending to elucidate the meaning of the parties. *Vilas v. Bundy,* 106 Wis. 168, 176, 81 N. W. 812. Where the jury had only to decide whether one set of words or another were in fact used, neither being ambiguous, such an instruction as this would be highly misleading. No rule of law confers higher credibility on a real-estate agent, as such, than upon others.

Error is assigned upon refusal to submit in the special verdict three questions requested. The first and second were properly refused, because of entire absence of conflict in the evidence upon their subjects. The third inquired whether

the misrepresentations were sufficient to influence the conduct of a person of ordinary intelligence. There is no such issue in an action for deceit. The sole question is whether the misrepresentations in fact deceived the party involved and materially affected his conduct. Effectiveness of deceit is to be tested by its actual influence on the person deceived, not by its probable weight with another. *Barndt v. Frederick,* 78 Wis. 1, 11, 47 N. W. 6; *Kaiser v. Nummerdor,* 120 Wis. 234, 239, 97 N. W. 932.

Some other errors are assigned, but we cannot discover that discussion of them can be useful upon the retrial.

By the Court.—Judgment reversed, and cause remanded for new trial.

SMITH, Administratrix, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

January 31—February 23, 1906.

Electricity: Master and servant: Negligence: Contributory negligence: Declarations: Parts of a conversation: Evidence: Materiality: Competency: Cross-examination: Prejudicial error: Direction of verdict.

1. In an action for the negligent killing of an experienced lineman by his coming in contact with a wire heavily charged with electricity, it appeared, among other things, that decedent, on the morning of the accident, had a conversation with defendant's superintendent at the power house. On the direct examination of defendant's witnesses part of this conversation, to the effect that the superintendent apprised decedent that, in doing the work on the pole on which he was afterwards killed, he must look out for and guard against live wires, was elicited. Upon cross-examination, and also in rebuttal, plaintiff's counsel sought to prove all this conversation, and propounded questions tending to show that in such conversation the decedent requested the superintendent to shut off the current while he performed the duties assigned him at the pole in question, and that the superintendent informed decedent that the current would be shut off, which evidence, on objection, was excluded.

The trial court ruled that the decedent was sufficiently warned of the danger and that he had assumed the risk incident to it; that therefore no actionable negligence was shown, and directed a verdict for defendant. *Held:*

(1) If the superintendent so informed decedent, such evidence was material on the question of decedent's contributory negligence.

(2) The evidence was material and competent under the rule that all parts of a conversation, if material to the issues litigated, may properly be offered by either party as a matter of right, and that each party may give his version of a conversation, and if one gives a part sufficiently complete to be material to the case the other has a right to prove the balance.

(3) Such right may be exercised by cross-examination or by calling other witnesses.

(4) The exclusion of such evidence was prejudicial.

2. In such case evidence that a statement that the wires were charged was made in decedent's presence, when from other evidence it appeared doubtful whether decedent heard such statement, did not authorize the direction of a verdict.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

Plaintiff, as administratrix of the decedent's estate, brings this action to recover the damages resulting from his death, which is alleged to have been caused by the negligence of the defendant. It is alleged that John J. Smith, the deceased, was in the employ of the defendant on July 20, 1904, and that while in the discharge of his duties he came in contact with a live electric wire of defendant's electric light plant in the city of Racine, and that an electric current of strong potentiality was thereby caused to pass through his body and that this resulted in his immediate death. Negligence is charged upon two grounds: (1) That the copper wires charged with an electric current of high voltage "were negligently and improperly maintained (as part of said plant) by the said defendant, in that the insulation thereof was defective, faulty, worn, and insufficient, as the defendant well knew or should have known; and, (2) furthermore, in that the said wires did not constitute a perfect and distinct circuit well and

safely insulated from the earth, but had been allowed by the negligence of the defendant to become connected with the earth, thereby causing what is known as a 'ground,' as defendant well knew or should have known in the exercise of ordinary care. That the said 'ground' was a hidden defect highly dangerous to any person who might be upon the said pole, the means of knowledge thereof being entirely within the control of defendant." It is claimed that for these reasons the place upon the pole where the decedent worked was rendered an unsafe place, and the pole and wires were unsafe and dangerous appliances. Defendant denies the negligence charged and alleges contributory negligence on the part of the decedent. It appears that on the day in question the decedent, in the course of his employment as lineman, worked upon one of the poles of defendant's plant, under the direction of the superintendent of the company, and that while so engaged in his work he was killed in the manner above described. The pole in question had several cross-arms, to which wires were attached; the upper ones sustained telephone wires, while the lower ones carried electric-light wires. At the time of the accident decedent had rested his weight on the fifth cross-arm from the top and was working on the wires above the fourth cross-arm. In doing this work his body came in contact with a live wire on the fourth cross-arm and from it came the electric current which resulted in his death. The decedent had worked for a number of years prior to the accident as a lineman on electric plants. On cross-examination plaintiff sought to elicit evidence of a conversation between the decedent and an officer of the defendant, part of which had been introduced by the defendant, as to a shutting off of the current while the work on the pole and the wires in question was being done. The court refused to receive this evidence and also excluded it on rebuttal as being irrelevant and immaterial. At the conclusion of the introduction of the evidence defendant moved for the direction of a verdict in its favor. The court so di-

rected a verdict, upon the ground, among others, that the evidence showed that the decedent was sufficiently warned of the dangers incident to his employment and that he therefore assumed the risk. Judgment was awarded dismissing the complaint and for costs. This is an appeal from such judgment.

For the appellant there was a brief by *Wallace Ingalls,* attorney, and *Fish & Storms,* of counsel, and oral argument by *Mr. I. N. Fish* and *Mr. Ingalls.*

Clarke M. Rosecrantz, for the respondent.

SIEBECKER, J. The evidence adduced shows that the decedent was an experienced lineman and had knowledge of the dangers commonly incident to such employment in working in proximity to live electric wires of high potentiality. It appears that a conversation which he had on the morning of the day of the accident at the power house with the superintendent in the presence of other workmen was partly elicited upon direct examination of some of defendant's witnesses. So far as shown it was to the effect that the superintendent apprised decedent that in doing the work on the pole in question he must look out for and guard against the live wires carried on the cross-arms of the pole. Upon cross-examination of these witnesses plaintiff's counsel propounded an inquiry as to whether the decedent in this conversation requested the superintendent to shut off the current while he performed the duties assigned to him at the point in question. Plaintiff also offered to prove all of this conversation in rebuttal of defendant's claim—to which proof was admitted—that decedent was fully warned of the danger, namely, that these wires were charged with a high potential current. It is claimed that if the whole conversation had been admitted it would have tended to show that the decedent was informed by the superintendent that the current would be shut off. If the superintendent so informed him it seems quite clear that it would have been very material on the question of decedent's contrib-

utory negligence. For if he was so informed he had a right to assume that the wires were not charged with electricity at the time he worked among and on them and he would not be guilty of a want of ordinary care in coming in contact with them as he did. The fact, which appears in evidence, that in the forenoon of the day the current was cut off to enable the decedent and other linemen to repair the wires, lends emphasis to the importance of this evidence as tending to show that he was free from contributory negligence, and that he had a right to assume that the current had been cut off. The trial court ruled that the decedent was sufficiently warned of the danger and that he assumed the risk incident to it, and that therefore no actionable negligence was shown. It is manifest from the record that the verdict was directed upon the ground that, under the facts and circumstances disclosed by the evidence, it conclusively appeared that decedent had assumed the risk of all dangers incident to the alleged negligence. As above indicated, this is erroneous if he had been informed or was led to believe that the current would be cut off the wires with which he came in contact. The evidence as to defendant's negligence in the respect charged is in conflict and permits of different reasonable inferences in support of the claims of either party, and it therefore presents a question to be determined by a jury. *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57; *Zentner v. Oshkosh G. L. Co.* 126 Wis. 196, 105 N. W. 911.

The ruling above complained of was erroneous upon a well-established rule as to the competence and materiality of evidence, namely, that all parts of a conversation, if material to the issues litigated, may properly be offered by either party as a matter of right, and "each party may give his version of a conversation, and if one gives a part sufficiently complete to be material to the case, the other has the right to prove the balance. That, of course, he may do by cross-examination or by other witnesses." *Fertig v. State,* 100 Wis. 301, 75 N.

W. 960, and cases cited; *Garvin v. Gates,* 73 Wis. 513, 41 N. W. 621; *Hupfer v. Nat. D. Co., post,* p. 306, 106 N. W. 831. The respondent contends that these rulings of the court cannot be regarded as prejudicial, because, after the alleged conversation at the power house, at a meeting of the superintendent and the decedent in the street near the pole on which the accident occurred, the superintendent informed him as he was ascending the pole that the wires were charged with an electric current and that he must look out for this danger. It is true that defendant's witnesses testified to this effect, but it also appears by the evidence of the witness Randall, who worked with decedent and was at the foot of the pole where this conversation is claimed to have occurred, that, in speaking, the superintendent addressed him and not the decedent, and that decedent had then ascended the pole to such a height that on account of noises he probably did not hear what was said, and that he did not thereafter communicate to the decedent anything said by the superintendent. Under these circumstances it cannot be said that it appears without dispute that the decedent was warned that the wires were charged with an electric current. The exclusion of this evidence was prejudicial and necessitates a retrial of the case.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

IN RE O'HARA'S WILL: MOYNAHAN and another, Appellants, vs. ALLEN, Administrator, and others, Respondents.

January 31—February 23, 1906.

Appeal from county court: Discretion: Laches.

1. Under sec. 4035, Stats. 1898, application to the circuit court for leave to appeal from an order of the county court after the time within which an appeal may be taken as a matter of right has expired, is addressed to the sound discretion of the circuit

court, and the determination of that court will not be disturbed unless it clearly appears that such discretion has been abused.

2. Under the facts stated in the opinion, an application to the circuit court in March, 1904, for leave to appeal from an order of the county court construing a will entered in March, 1903, is *held* barred by laches.

3. In such situation there is *held* to be no abuse of discretion in denying the application.

APPEAL from an order of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an appeal from an order of the circuit court of Walworth county denying an application under sec. 4035, Stats. 1898, for leave to appeal from an order of the county court of said county construing the will of Sabina O'Hara, deceased, and determining the authority of the administrator with the will annexed thereunder. Sabina O'Hara died testate February 21, 1891, in Walworth county, leaving her surviving two daughters, Mary Dougherty and *Jennie Moynahan,* and six sons, Thomas, Michael, *James,* John, David, and Edward, named as legatees. John Coady was appointed sole executor, and died before the will was admitted to probate, whereupon letters of administration with the will annexed were granted to *Dwight S. Allen,* June 18, 1891. The will provided for the sale of real estate in case it should not be sold during the lifetime of the testatrix and it became necessary to sell the same or any part thereof, and authorized and directed the executor to sell, and by proper and sufficient deeds convey the same either as a whole or in parcels, and out of the proceeds to pay debts or expenses, and distribute the remainder of the proceeds of sale among the legatees named in the will. The property of the testatrix consisted of about fifty-two acres of land appraised after her death at $10,400, incumbered by a mortgage of $2,800, and a claim of $200 and interest against *Jennie Moynahan,* one of the legatees. The administrator with the will annexed continued in possession of this real estate after his appoint-

ment and endeavored to find a satisfactory purchaser, but did not succeed in so doing until the spring of 1903, and, being in doubt as to his right to sell, applied to the county court of Walworth county for a construction of the will in that regard. Notice was given by publication, and, upon the hearing, no appearance was made by the heirs, the administrator, *Dwight S. Allen,* appearing by his attorney, and after hearing upon the petition the court found that, in order to carry out the provisions of the will and to further administer and settle the estate, it was necessary to sell the real estate and execute proper deeds of conveyance thereof, and that the administrator was empowered by the provisions of the will to sell the same and execute proper deeds of conveyance, and so ordered March 24, 1903. In pursuance of this order the administrator sold the real estate in question to John B. Grommes for the sum of $20,000, and immediately thereafter, and in March, 1903, said purchaser went into possession of the same and made permanent improvements thereon of the value of upwards of $15,000 before the filing of the petition for permission to appeal by the appellants, and before notice of dissatisfaction on their part. On March 31, 1903, the administrator filed his final account, and the court made an order assigning the residue of the estate according to the will, and ordered that the amount of said residue, $411.31, belonging to the appellant *Jennie Moynahan* be set off against her indebtedness to the estate. All the heirs except *Jennie Moynahan* and Edward O'Hara received their portion of the residue accruing from the sale of the real estate, and in June, 1903, quitclaimed their interest therein to the purchaser, John B. Grommes, and the court on final distribution ordered the interest of appellant *Jennie Moynahan* set off against her indebtedness to the estate. In March, 1904, and nearly one year from the date of the order of the court construing the will and ordering sale of the real estate, the appellants *Jennie Moynahan* and *James O'Hara,* two of the legatees named in the will, filed their pe-

tition in the circuit court of Walworth county asking leave to appeal from the order of construction, and, after hearing, the application for permission to appeal was denied.

For the appellants the cause was submitted on the brief of *John M. Duffy* and *H. J. Desmond,* attorneys, and *C. M. Scanlan,* of counsel.

For the respondents there was a brief by *Cooper, Simmons, Nelson & Walker,* attorneys, and *Charles S. French,* of counsel, and oral argument by *J. B. Simmons.*

KERWIN, J. The court below in denying the right to appeal held that appellants were guilty of laches. Several other questions are discussed by counsel under various assignments of error upon this appeal; but, if the court did not abuse its discretion in holding that the appellants were guilty of laches, the order must be affirmed, and no other question argued need be considered. Sec. 4035, Stats. 1898. It appears from the record that the administrator had been endeavoring for many years, in accordance with the provisions of the will, to obtain a desirable purchaser and make a sale, but until 1903 failed to carry out his purpose. In 1895, in order to hold the property until an adequate price could be obtained therefor, he secured a license to mortgage it, and did obtain a loan of $1,472 thereon for the purpose of paying accrued interest on the $2,800 mortgage and claims allowed against the estate. In the spring of 1903 the interest upon both mortgages had accumulated for a period of about eight years and was then unpaid. It further appears that at or about the time the administrator had obtained the bid of $20,000 from the purchaser, Grommes, which was accepted, and in February, 1903, he called upon the appellant *Jennie Moynahan* in the city of Chicago, and informed her of the agreed sale and the terms thereof, and of the necessity of immediately closing the same, and requested that she quitclaim her interest to the purchaser, which she refused to do, but made no objection to the sale or

the terms thereof; that the administrator then informed her that her signature was not necessary, and that the sale would be carried out in accordance with the agreement. It also appears that in the summer of 1903 the interest of said appellant *Jennie Moynahan* was being looked after by her attorney, and a letter was written by him, at least as early as October 9, 1903, to the administrator respecting the interest of said petitioner *Moynahan*. It also appears from this letter that the attorney was more concerned respecting the indebtedness of said *Jennie Moynahan* to the estate than the matter of sale of the property, expressing his desire to see and examine the note, and making no objection to the sale. All the other heirs, except Edward O'Hara, assented to the sale, quitclaimed their interest to the purchaser, and received their portion of the proceeds; their quitclaim being executed about the 8th of June, 1903. The petitioner *James O'Hara,* having received his interest and executed a quitclaim deed to the purchaser, clearly cannot complain of the sale, and the petitioner *Jennie Moynahan* had knowledge of the terms of the sale at or about the time it was made, and also knowledge of the order construing the will and allowing sale, at least as early as November, 1903. This clearly appears from the record. She did not move until nearly a year after she received the notice that the sale would be made, and more than three months after notice that the order was made, during which time the purchaser was in possession, making valuable improvements and changing his position on the faith of his purchase. It is quite apparent, too, from the proof appearing on the hearing that her real complaint was not because of the sale, but because of the fact that the residue belonging to her on final settlement was offset against her indebtedness to the estate, and that if she had received this amount she would have made no objection to the sale. The purchaser, Grommes, after sale went into and has ever since continued in possession and made valuable improvements upon the property aggregating upwards of

$15,000. Many other questions respecting the value of the property, the *bona fides* of the sale, and insolvency of the heirs to whom payments have been made were considered upon the hearing on application for permission to appeal which we do not deem necessary to recite here.

Complaint is made by counsel for appellants that counter affidavits were used on the hearing. It appears from the record that they were considered only on the question of laches, and the facts showing laches or fault on the part of the appellants are practically undisputed. The application for leave to appeal after the time has expired in such cases is addressed to the sound discretion of the court, and the determination of the court will not be disturbed unless it clearly appears that such discretion has been abused. *Deering H. Co. v. Johnson,* 108 Wis. 275, 84 N. W. 426; *Weadock v. Ray,* 111 Wis. 489, 87 N. W. 477; *McKenney v. Minahan,* 119 Wis. 651, 97 N. W. 489. From the whole record the case made by the appellants is one of "neglect and inattention" and cannot appeal strongly to the court, especially where it appears, as in this case, that the purchaser whose title would be affected by a revision of the decree has incurred large expense and materially changed his situation in consequence of the delay and apparent acquiescence on the part of the appellants. *Blanchard v. Doering,* 23 Wis. 200; *Meehan v. Blodgett,* 86 Wis. 511, 57 N. W. 291; *Melms v. Pabst B. Co.* 93 Wis. 153, 66 N. W. 518; *Rogers v. Van Nortwick,* 87 Wis. 414, 58 N. W. 757; *McCann v. Welch,* 106 Wis. 142, 81 N. W. 996; *Hamilton v. Menominee Falls Q. Co.* 106 Wis. 352, 81 N. W. 876; *State ex rel. Taylor v. Superior,* 108 Wis. 16, 83 N. W. 1100. We are unable to discover that there was any abuse of discretion in denying appellants' application for leave to appeal.

By the Court.—The order appealed from is affirmed.

IN RE BOX'S WILL: BURDEN and others, Appellants, vs. BLAKEY, Administrator, and another, Respondents.

January 31—February 23, 1906.

Appeal from county court, how taken: Filing notice of appeal: Undertaking: Discretionary orders: Authentication of records: "Exemplified copy:" Jurisdiction: Foreign wills: Attempted probate in Wisconsin.

1. Under sec. 4031, Stats. 1898, an appeal from an order or judgment of a county court is taken by filing the prescribed notice within the sixty days allowed, and an undertaking perfecting such appeal filed a few days after the expiration of the sixty days, if otherwise sufficient, should be accepted and approved by the county court.
2. In such situation, if the county court refuses to approve such undertaking, the circuit court on petition should, under the provisions of sec. 4035, Stats. 1898, allow such appeal upon such terms and within such time as that court deems to be reasonable, and the denying of such a petition is an abuse of discretion.
3. In order to entitle the records and judicial proceedings of the courts of other states and countries to the faith and credit required by constitutional mandate, it must appear, in the manner prescribed by law, that the court rendering the same had jurisdiction.
4. Under the provisions of secs. 3787, 3789, 3790, Stats. 1898, governing the probate of foreign wills, and secs. 4140, 4145, Stats. 1898, and sec. 905, R. S. of U. S., governing the authentication of the records of a foreign court, the "exemplified copy" of a foreign will and of the record admitting the same to probate means a duplicate or transcript of the will and of the records or proceedings in the probate court admitting such will to probate, duly certified by the custodian as having "been by him compared with the original," and on failure to comply with such requirement the county court to which application to admit such foreign will is made does not acquire jurisdiction.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

APPEAL from a judgment of the circuit court for Racine county: WARREN D. TARRANT, Judge. *Reversed.*

It appears from the record and is undisputed that Henry Box, of Evanston, in Cook county, Illinois, died September 12, 1903, leaving a will executed about a month before, in and by which he gave, devised, and bequeathed all of his property, real, personal, and mixed, to James H. Dale, of Yorkville, Wisconsin, and *James Hibben,* of Evanston, aforesaid, in trust as joint tenants and not as tenants in common, for the benefit of his children therein named, with directions as therein stated, and therein nominated, constituted, and appointed said trustees as executors of his will. It appears that that will was filed with the clerk of the probate court of Cook county, Illinois, September 25, 1903. Immediately following the copy of the will in the record are these statements:

"Will proved and admitted to record in open court this 20th day of October, A. D. 1903.

"CHARLES S. CUTTING, Probate Judge.

"State of Illinois, } ss.
"County of Cook. }

"In the probate court of Cook county.

"Proved and admitted to record in open court this 20th day of October, A. D. 1903.

"PATRICK J. CAHILL, Clerk."

Then, to prevent the property in Illinois from being lost or destroyed or diminished in value, follows "Letters testamentary to *James Hibben*" as executor, purporting to be issued by and under the seal of the probate court of said Cook county, October 20, 1903, and signed "Patrick J. Cahill, Clerk." Then come the following certificates under the seal of said probate court, all under date of October 20, 1903:

"State of Illinois, } ss.
"County of Cook. }

"I, Patrick J. Cahill, clerk of the probate court of Cook county, in the state aforesaid, do hereby certify that the within is a true and correct copy of the last will and testament of Henry Box, deceased, and of letters testamentary issued thereon on the 20th day of October, A. D. 1903, to *James*

Hibben, now in force, as it appears from the originals on file and from the records of the probate court in my office.

"In witness whereof, I have hereunto set my hand and affixed the seal of the said probate court, at Chicago, in said county, this 20th day of October, A. D. 1903.

"PATRICK J. CAHILL, Clerk."

Also the certificate of the clerk of said probate court to the effect that he was the keeper of the records and files of said probate court and that the annexed and foregoing was a true and correct copy of the said will as it appeared from the original on file and from the records of said court in his office. Also a certificate of said probate judge to the effect that the person whose name was subscribed to the foregoing certificate of attestation was and is such clerk and the keeper of such records, files, and seal, duly elected and qualified as such, and that full faith and credit ought to be given to all his official acts as such, in all courts of record and elsewhere, and that his said attestation is in due form of law and by the proper officer. Also a certificate of said clerk to the effect that the person whose name was subscribed to the annexed and foregoing certificate was at the time and now is such probate judge, duly elected, commissioned, and qualified, and that his signature was genuine.

November 17, 1903, upon the petition of said James H. Dale, filed in the county court of Racine county October 21, 1903, and notice given, it was ordered and decreed by the county court of Racine county, in effect, that said authenticated copies of the probate court of Cook county be allowed, filed, and recorded, and have the same force and effect as if said will had been originally proved and allowed in the county court of Racine county; and it appearing that said *Hibben* was a resident of Illinois and did not desire to act as executor in this state and that said Dale is a resident of Racine county, it was therefore ordered that said Dale be and he was thereby decreed as sole executor of said will in and so far as the same

related to the estate in Wisconsin, and that, upon his being qualified, letters testamentary be issued to him.

On or about January 11, 1904, notice of appeal to the circuit court from such order, judgment, and determination admitting such will to probate and issuing letters testamentary thereon to James H. Dale was duly given by heirs at law and legatees and devisees named in the will to such county judge and to all others concerned, and duly filed therein. January 12, 1904, the said appellants tendered to the county court an undertaking on such appeal executed by the United States Fidelity & Guaranty Company, duly licensed to execute bonds, and a copy of whose license was on file in the county court of Racine county, but the county court refused to approve the said bond on the ground that it was not signed by the appellants. Thereupon the appellants signed the bond and undertaking for the purpose of taking such appeal, and tendered the same to the county court for that purpose January 18, 1904, a few days after the expiration of the time for taking the appeal, but the county court refused to approve the bond for the reason that the certificate of the commissioner of insurance was not attached thereto, showing the company was licensed to do business in the state of Wisconsin. January 22, 1904, the appellants made their verified petition showing the facts mentioned and particularly as to the giving of said bonds, and prayed the county court to allow an appeal to be taken from said judgment and order pursuant to the statutes of the state upon such terms and within such time as it should deem reasonable, and prosecuted in like manner and with like effect as though done seasonably, and annexed to said petition was a copy of said bond; and thereupon and on January 29, 1904, the circuit judge ordered said Dale to show cause February 4, 1904, why an order should not be made allowing said appellants to appeal to the circuit court as prayed for in said petition, and upon such petition and showing the circuit court on October 23, 1905, ordered that said petition be and

the same was thereby in all things denied without costs to either party, from which said order the appellants appeal to this court.

On February 20, 1904, said Dale died. Thereupon and in February, 1904, *Mrs. Blaine,* the Wisconsin heir at law and one of the legatees and devisees named in said will, petitioned said county court of Racine county for the appointment of *John S. Blakey* as administrator with the will annexed, and thereupon and in March, 1904, said *Hibben,* as such executor in Illinois, petitioned the county court of Racine county to be appointed as such executor in Wisconsin, and two other heirs at law, legatees and devisees named in said will, also petitioned the county court of Racine county that said *Hibben* be so appointed. Upon due notice and hearing of the parties the county court of Racine county on April 12, 1904, ordered and adjudged that *John S. Blakey* be and he thereby was appointed such administrator with the will annexed *de bonis non.* From that order and judgment the *Burdens,* being heirs at law and legatees and devisees named in the will, and *Hibben* appealed to the circuit court May 2, 1904. On May 19, 1904, the county judge of Racine county certified to the circuit court copies of the records and proceedings appealed from, including the order and judgment of April 12, 1904, and letters of administration issued thereon with such certified copies of such will and appeal papers. Thereupon the cause was heard in the circuit court, and upon November 15, 1904, the circuit court found as matters of fact several of the facts above set forth; and as conclusions of law the circuit court found in effect (1) that it was the duty of the county court of Racine county, upon the application made, to grant administration of said estate to some suitable and competent person as administrator *de bonis non* with the will annexed on the death of said James H. Dale; (2) that said application was properly and seasonably made and the county court exercised a proper discretion and proceeded according to law in making

the order appealed from, appointing the said *John S. Blakey* such administrator with the will annexed; (3) that said order of the county court of Racine county, so appointing *Blakey,* was *res adjudicata* and should not be disturbed; (4) that said *Blakey* was entitled to recover from the appellants his taxable costs and disbursements on that appeal and ordered judgment to be entered accordingly, and that the records be remitted to the county court for further proceedings according to law. Thereupon and on December 10, 1904, it was ordered and adjudged by the circuit court that the order of the county court of Racine county made April 12, 1904, appointing said *Blakey* such administrator, be and the same was thereby affirmed, with costs against the appellants, taxed at $39.46, and it was ordered that the records be remitted to the county court. From that order and judgment the said *Burdens* and *Hibben* appeal.

For the appellants there were briefs by *John W. Owen* and *Kearney, Thompson & Myers,* attorneys, and *Elmer W. Adkinson,* of counsel, and oral argument by *Mr. Owen* and *Mr. W. D. Thompson.*

For the respondents there were briefs by *Palmer & Gittings,* and oral argument by *C. C. Gittings.*

CASSODAY, C. J. 1. The notice of appeal to the circuit court from the order, judgment, and determination of the county court made November 17, 1903, admitting the will to probate and issuing letters testamentary thereon to Dale, was filed with the county court on or about January 11, 1904, and hence within sixty days after the rendition of such judgment, as prescribed in the statute. Sec. 4031, Stats. 1898. That section declares that such appeal may be taken by filing such notice within sixty days, "together with such undertaking as is required in the next section." Sec. 4032, Stats. 1898. In this case an undertaking was filed January 12, 1904, which the county judge refused to approve on the grounds stated,

and another undertaking was filed January 18, 1904, a few days after the expiration of the sixty days, which the judge also refused to approve. But this court has recently "held that, where a notice of appeal under such section was filed in time, the fact that the undertaking was not filed with the notice was not a fatal defect though it was not filed within the time limited for taking the appeal." *Charmley v. Charmley,* 125 Wis. 297, 103 N. W. 1106. It is evident from the facts mentioned in the foregoing statement that the undertaking of January 18, 1904, tendered to the county court to perfect said appeal, should have been accepted and approved by the county court. Failing to do so, the circuit court should, on February 4, 1904, have granted the prayer contained in the petition of the appellants, verified January 22, 1904, and allowed such appeal from said judgment of November 17, 1903, "upon such terms and within such time" as that court deemed to be reasonable, as mentioned in the statement. It follows from what has been said that the order of the circuit court denying such application twenty-one months after it was made was an abuse of discretion.

2. The important question in the case is whether the county court of Racine county had jurisdiction to make the judgment and order complained of. Of course, the courts of this state were required to give full faith and credit to the records and judicial proceedings in the probate court of Cook county in the state of Illinois. But in order to entitle such records or proceedings to such faith and credit it must appear, in the manner prescribed by law, that the court rendering the same had jurisdiction. *Board of Public Works v. Columbia College,* 17 Wall. 521; *Thompson v. Whitman,* 18 Wall. 457; *St. Clair v. Cox,* 106 U. S. 350, 1 Sup. Ct. 354; *Robertson v. Pickrell,* 109 U. S. 608, 3 Sup. Ct. 407; *Overby v. Gordon,* 177 U. S. 214, 223, 20 Sup. Ct. 603; *Frame v. Thormann,* 102 Wis. 653, 670, 79 N. W. 39; *Wells, Fargo & Co. v. Walsh,* 88 Wis. 534, 60 N. W. 824; *McIntosh v. Marathon*

L. Co. 110 Wis. 296, 303, 304, 85 N. W. 976. Some of these cases are quite similar in their facts. Our statutes provide that a "will duly admitted to probate" in another "state and in the place of the testator's domicile may be admitted to probate and recorded in this state by duly filing an *exemplified copy* of said will and of the record admitting the same to probate." Sec. 3789, Stats. 1898. And that "when a copy of any such will and the probate thereof, duly authenticated, shall be produced by the executor or other person interested therein to the county court, such court shall appoint a time and place of hearing, and cause notice thereof to be given as required by sec. 3787. If on the hearing it shall appear to the court that the order or decree admitting such will to probate was made by a court of *competent jurisdiction* and is still in force, the copy and the probate thereof shall be filed and recorded, and the will shall have the same force and effect as if it had been originally proved and allowed in the same court." Sec. 3790, Stats. 1898. Besides, the statute declares:

"The records and judicial proceedings of any court of the United States or of any state or territory or district thereof shall be admissible in evidence in all cases in this state *when authenticated* in the manner directed in sec. 4140, by the *attestation* of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of the court annexed." Sec. 4145, Stats. 1898.

The section therein mentioned declares, in effect, that any copy of "the original records, papers and files in or concerning any action or proceeding of any nature or description in any court, being certified by the clerk, judge or justice having legal custody of the original, to have been *by him compared with the original* and to be a true copy thereof, such certificate having affixed the seal of the court or of such officer, if any be required by law to be kept, shall be received with like effect as the original." Sec. 4140, Stats. 1898. In the case at bar no such certificate was affixed. There is a certificate by the

clerk that a paper in the record is a true copy of the will, but there is nothing in the record indicating that the same had "been by him compared with the original." Nor is there anything in the record indicating that the "judicial proceedings" in the probate court of Cook county had ever been "authenticated" or attested in the manner thus prescribed. The statute quoted required as a condition precedent to admitting such will to probate, not only the "filing" of "an exemplified copy of said will," but also "an exemplified copy . . . of the record admitting the same to probate." Sec. 3789, Stats. 1898. So the statute only allowed such foreign will to be admitted to probate in case it should be made to "appear to the court that the order or decree admitting such will to probate was made by a court of competent jurisdiction." Sec. 3790, Stats. 1898. In view of the several provisions of the statutes cited, such "exemplified copy" clearly means a duplicate or transcript of the records or proceedings in the probate court of Cook county admitting such will to probate, "duly authenticated" under the seal of that court and duly certified to by the custodian of such records and proceedings. So far as appears from the record before us, there was a failure to comply with such requirements of the statutes. The same is true as to the mode of authentication and proof of the records and judicial proceedings of the courts of the several states, as prescribed by the statutes of the United States, from which some of the sections of our statutes were taken. Sec. 905, R. S. of U. S. [U. S. Comp. St. 1901, p. 677].

By the Court.—The order of the circuit court refusing the application made February 4, 1904, to allow an appeal from the order, judgment, and determination of the county court made in said matter November 17, 1903, is hereby reversed, and the cause is remanded for further proceeding in that regard according to law. And the order and judgment of the circuit court entered December 10, 1904, affirming the order

and judgment of the county court of April 12, 1904, is reversed, and the cause is remanded for further proceedings according to law.

ANDERSON, by guardian *ad litem*, Appellant, vs. CHICAGO BRASS COMPANY, Respondent.

February 1—February 23, 1906.

Master and servant: Negligence: Personal injury: Machinery: Guards: Failure to warn: Assumption of risk: Nonsuit: Instructions to jury: Prejudicial error: "Ordinary care:" Special verdict: Opinion evidence: Depositions: Admissibility.

1. In an action for personal injuries received by a servant in feeding brass sheets into a rolling machine, the negligence alleged was (1) in not providing the machine with a guard, and (2) in not warning the plaintiff of the danger resulting from sharp slivers of brass which occasionally formed on the sides of the sheets. Under the evidence, stated in the opinion, *held:*

   (1) The court rightly struck out the evidence as to the guard and eliminated that question from the case.

   (2) As to the failure to warn, there was evidence from which the jury might find negligence on the part of defendant.

   (3) Assumption of risk as matter of law was not shown.

   (4) A motion for nonsuit was properly overruled.

2. An instruction to the jury on the subject of burden of proof and preponderance of the evidence as follows: "By burden of proof I mean that it is incumbent on the party affirmatively asserting an allegation to establish it by a fair preponderance of the credible evidence, facts, and circumstances proven on the trial; and by 'preponderance of evidence,' as I have used the term, is meant the greater convincing power of evidence. That is, in the trial of a lawsuit that side has furnished the preponderance of evidence which has produced evidence of greater convincing power in the minds of the jury than that produced by the other side. And when the law imposes upon a party the burden of proof it means that such party is bound to produce evidence in support of the proposition involved of greater convincing power than that produced by the other side. Such convincing power of evidence is not necessarily determined by the number of witnesses, for it may be that the testimony given by one wit-

ness has greater convincing power than that given by several witnesses contradictory or tending to contradict that given by the one," gives a definition of the term "preponderance of evidence" with substantial correctness, but not so with the definition of "burden of proof." The party on whom rests the burden of proof does not lift that burden by merely producing a preponderance of evidence. In order to entitle him to a finding in his favor his evidence must not only be of greater convincing power, but it must be such as to satisfy or convince the minds of the jury of the truth of his contention. Omission to convey this idea to the jury is prejudicial error.

3. In an action for personal injuries received by a sixteen-year-old boy, an instruction defining ordinary care as "such care as boys of the age, intelligence, and experience of the plaintiff usually exercise under similar circumstances" is not erroneous, although it would have been more exact had it contained words importing the idea that the care used must be the care used by the great mass of boys, or by the class of ordinarily careful boys.

4. In an action for personal injuries received by a servant from machinery, an instruction: "You are further instructed that the danger incident to the feeding of the straightening rolls of the machine, considered apart from the added dangers, if any, arising from the presence of the rough edges or slivers on the bars of brass, were open and obvious and are presumed to have been comprehended by the plaintiff, and in respect to which he assumed all risks," is misleading without an explanation that assumption of risk is a form of contributory negligence or want of ordinary care.

5. In an action for personal injuries received in operating a machine, one of the issues was whether the plaintiff did his work with ordinary care, and a question of a special verdict: "Did the plaintiff at the time of the accident feed the machine in the manner usually and customarily employed by experienced men," is *held* to relate to evidentiary matter instead of to a material issue.

6. When, in an action for personal injuries received while feeding a sheet of brass through the rollers of a machine, the plaintiff admitted that he knew of rough edges, but denied that he knew of the liability of there being slivers on the edge which might cause his hand to be drawn into the rolls, the coupling together, in a question of a special verdict, of an inquiry as to plaintiff's knowledge of liability of slivers on the sheets of brass with an inquiry as to his knowledge of the rough edges is prejudicial to plaintiff.

7. In such case a special verdict finding, in answer to one question, that plaintiff knew there were liable to be slivers on the bars of brass and that he ought to have known of the danger of his glove or hand being caught on them, and, in answer to another question, that he was not guilty of any want of ordinary care which contributed to the injury, is on its face inconsistent.
8. In an action for personal injuries received by a sixteen-year-old boy in operating machinery, the court excluded answers to questions asked experts bearing on whether the machine in question was a dangerous machine, whether it was so regarded, and whether it was not unusual to set boys at work on it for that reason. *Held*, that such interrogatories presented questions to be solved by the jury from the facts and circumstances in evidence, and on which the opinion of experts was not admissible.
9. The deposition of the employee of a party taken before trial under the provisions of sec. 4096, Stats. 1898, is inadmissible on the trial when the employee is present in court.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

This is an action to recover for personal injuries suffered by the plaintiff, an employee of the defendant sixteen years of age, while he was engaged in feeding sheets of brass to a machine called the straightening rolls, in the rolling mills of the defendant at Kenosha. The machine in question consists of an iron framework standing on the floor, supporting five metal rollers about six inches in diameter, which revolve by means of steam power applied to a pulley at one end of the machine, the rollers being so arranged as to compress the sheets of brass as they pass between them, three rollers being below and two above the sheets. The sheets of brass which the plaintiff was feeding on the day of the injury were about twelve feet long, eight to twelve inches wide, and about as thick as an ordinary book cover. These sheets lay on the floor at one side of and in front of the machine, and the plaintiff, in feeding, would pick up one and put the end between the rollers as they revolved, and guide it with his hands as it passed between the rollers until it was nearly through, and then pick up another

sheet and repeat the process. On the other side of the machine another employee received the sheet as it passed through and disposed of it. The object of rolling the sheets was to straighten and smooth them, they having already passed through other rolling machines, and having been gradually reduced in thickness from a bar about an inch thick. These various rolling processes produced some roughness on the edges of the sheets, and it appears that some of the sheets were ordinarily passed through the slitting machine to take off the rough edge before being put through the straightening rolls. The plaintiff had worked about four months in the defendant's mills before the accident; he was generally employed in the tinshop handling and wiping off tinned sheets of brass; at intervals, however, he had worked in the finishing department, and had several times been occupied in taking sheets from the straightening rolls, and twice before the injury he had fed the straightening rolls for short periods of time. He was furnished gloves by the defendant to use in doing his general work, and on the day of the accident, July 14, 1903, he had the gloves upon his hands buttoned at the wrist. On the day named he was feeding sheets through the straightening rolls, and as he fed them he held his hands on the edges of the sheets to guide them as they passed through. The evidence tends to show that, after working for fifteen minutes or so, a sharp longitudinal sliver of brass upon the edge of one of the sheets which he was feeding pierced the palm of the glove upon his right hand and drew his hand into the rolls, mangling it so as to necessitate amputation. The plaintiff claims that the defendant's foreman, one Schmelling, set him at this work, but this is denied by Schmelling. No warning of the danger was given him, nor direction as to the manner of doing the work. The plaintiff claims that he had no knowledge that such slivers ever formed upon the sheets, and the evidence tends to show that they only formed occa-

sionally. The negligence claimed in the complaint was, first, in failing to provide a guard upon the machine, and, second, in failing to warn the plaintiff of the danger. The defendant denied that the plaintiff was set at work at the machine at all, and alleged that he was guilty of contributory negligence. The following special verdict was rendered:

"(1) Did the defendant, through its foreman, James Daniel Schmelling, direct the plaintiff to feed brass to the straightening rolls on the day and prior to the time of the accident? *A.* Yes. (2) Did the plaintiff at the time of the accident feed the machine in the manner usually and customarily employed by experienced men? *A.* Yes. (3) Did the plaintiff, at and prior to the time of the accident, know that there were liable to be slivers and rough edges on the bars of brass run through the straightening rolls? *A.* Yes. (4) Ought the plaintiff in the exercise of reasonable care and prudence and under all the circumstances of the case to have understood and comprehended the danger of his glove or hand being caught by the rough edges or slivers on the bars of brass? *A.* Yes. (5) If your answer to question 1 is 'Yes,' then ought the defendant in the exercise of reasonable care and prudence, under all the circumstances and in view of all previous experience, to have apprehended that there was danger that the plaintiff's hand might be drawn into the rolls in the manner described in the testimony? *A.* No. (6) If your answers to questions 1 and 5 are 'Yes,' then was the failure of the defendant to instruct the plaintiff as to the danger of his glove being caught on the slivers and rough edges of the bars of brass and as to the means of avoiding the same the proximate cause of the injury by the plaintiff sustained? *A.* No. (7) Was the plaintiff guilty of any want of ordinary care which contributed to produce the injury sustained by him? *A.* No. (8) In the event that the court is of the opinion that the plaintiff is entitled to a judgment in this case, then at what sum do you fix the damages by him sustained? *A.* $3,000."

Motions by the plaintiff to change the answers to the questions of the special verdict, and for judgment upon the ver-

dict, and to set aside the verdict and grant a new trial, were successively overruled, and judgment was rendered on the verdict for the defendant, from which the plaintiff appeals.

Norman L. Baker, for the appellant.

For the respondent there was a brief by *Peter Fisher,* attorney, and *Kearney, Thompson & Myers,* of counsel, and oral argument by *Mr. Fisher* and *Mr. W. D. Thompson.*

WINSLOW, J. The defendant made a motion for nonsuit at the close of the plaintiff's evidence, and it now claims that, regardless of any question of error in the reception of evidence or charge of the court, the judgment should be affirmed because the plaintiff made no case. Defendant's contentions on this point are, in general, that no negligence was shown on its part, and that, even conceding that there was any such negligence shown, the plaintiff knew, or ought to have known, of the danger, and assumed the risk. The plaintiff claimed negligence in two respects: (1) In not providing the machine with a guard, and (2) in not warning the plaintiff of the danger resulting from sharp slivers of brass which occasionally occurred on the sides of the sheets. As to the first of these claims there was evidence showing that a sort of a metal canopy or guard was sometimes placed over the top rollers which came down in front nearly to the sheet of brass, that this canopy was not on the machine at the time of the accident, and the claim is that its absence constituted negligence. The evidence, however, failed to show that this canopy or guard was in general use in this shop or other shops upon similar machines; that its principal object was to prevent foreign substances from falling on the sheet of brass as it was passing through the rolls, nor was it made apparent how it could in any way have prevented the accident in question. On these grounds the court rightly struck out the evidence as to the guard and eliminated that question from the case.

Upon the question of failure to warn, however, we think

there was evidence from which the jury might find negligence on the part of the defendant, and we do not think that the evidence showed assumption of risk as matter of law. The evidence tended to show that while the edges of the sheets were frequently rough and uneven, and the plaintiff knew that fact, it was only occasionally, sometimes at intervals of several days, that a sharp sliver formed longitudinally on the edge, and that the plaintiff had no knowledge that such slivers ever formed. Now it is manifest that the danger to an operative resulting from the occasional presence of these sharp rigid slivers was entirely different from the danger resulting from the presence of a mere rough edge, and if this occasional and serious danger was known, or under the circumstances ought to have been known, to the employer, and was not known or capable of being discovered by the employee in the exercise of ordinary care, the employer would be guilty of negligence in not warning the employee thereof when setting him at work. By parity of reasoning, the plaintiff could not properly be held to have assumed the risk as matter of law, so we conclude that the motion for a nonsuit was properly overruled.

The serious questions in the case arise upon the charge of the court and the special verdict. The court charged the jury on the subject of burden of proof and preponderance of the evidence as follows:

"I shall use the term 'burden of proof' in connection with these instructions, and by burden of proof I mean that it is incumbent on the party affirmatively asserting an allegation to establish it by a fair preponderance of the credible evidence, facts, and circumstances proven on the trial. And by 'preponderance of evidence,' as I have used the term, is meant the greater convincing power of evidence. That is, in the trial of a lawsuit that side has furnished the preponderance of evidence which has produced evidence of greater convincing power in the minds of the jury than that produced by the other side. And when the law imposes upon a party the burden of proof it means that such party is bound to produce evidence in support of the proposition involved of greater con-

vincing power than that produced by the other side. Such convincing power of evidence is not necessarily determined by the number of witnesses, for it may be that the testimony given by one witness has greater convincing power than that given by several witnesses contradicting or tending to contradict that given by the one."

The definition thus given of the term "preponderance of the evidence" was substantially correct, but not so with the definition of "burden of proof." It is well settled by a long series of decisions in this court that the party upon whom rests the burden of proof does not lift that burden by merely producing a preponderance of evidence. He may produce a preponderance, that is, he may produce evidence of slightly greater convincing power to the mind than that produced by his opponent, but still his evidence may be weak and leave the mind in doubt. In order to entitle himself to a finding in his favor his evidence must not only be of greater convincing power, but it must be such as to satisfy or convince the minds of the jury of the truth of his contention. This idea, in some definite and certain form, must be given to the jury or the instruction will be incomplete and erroneous. *Gores v. Graff*, 77 Wis. 174, 46 N. W. 48; *Pelitier v. C., St. P., M. & O. R. Co.* 88 Wis. 521, 60 N. W. 250; *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671; *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377; *Knopke v. Germantown F. M. Ins. Co.* 99 Wis. 289, 74 N. W. 795; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442; *Bowe v. Gage, ante,* p. 245, 106 N. W. 1074. This idea was nowhere given to the jury in the charge before us, and the omission was fatal.

The court defined ordinary care in connection with the seventh question as "such care as boys of the age, intelligence, and experience of the plaintiff usually exercise under similar circumstances." This instruction is complained of as erroneous because it does not carry the idea that the care used must

be the care ordinarily used by the great mass of boys or by the class of ordinarily careful boys. The instruction would have been more exact had it contained some words of this import, but under the decisions of this court we think it must be held that it fairly contains that idea, and hence is not erroneous. *Coppins v. Jefferson,* 126 Wis. 578, 105 N. W. 1078; *Pumorlo v. Merrill,* 125 Wis. 102, 103 N. W. 464.

The court gave the following general instruction:

"You are further instructed that the danger incident to the feeding of the straightening rolls of the machine, considered apart from the added dangers, if any, arising from the presence of the rough edges or slivers on the bars of brass, were open and obvious and are presumed to have been comprehended by the plaintiff, and in respect to which he assumed all risks."

This instruction, while doubtless correct as a general proposition, had no legitimate bearing on any question of the special verdict except the seventh, nor would it have any bearing on the seventh question which would be obvious to the jury unless it were explained to them that assumption of risk was a form of contributory negligence or want of ordinary care. No such explanation was made and the instruction seems therefore to have been misleading rather than helpful.

Passing to a consideration of the verdict, we think it must be said that it is not happily framed. After the elimination of the question of the lack of the guard from the case the issues were simple and may be stated as follows: (1) Was the plaintiff set at work at the machine by the defendant? (2) Was the defendant guilty of negligence in failing to warn the plaintiff of the danger resulting from the occasional presence of slivers? (3) If so, was such failure to warn the proximate cause of the accident? (4) Did the plaintiff assume the risk or was he guilty of contributory negligence? In this statement of the issues it is not intended to indicate that the issues should be submitted to the jury in this form, but

simply that these were the ultimate issues to be covered by the questions of the verdict. Turning to the verdict, it is at once seen that the second question relates rather to an evidentiary matter than to one of the material issues. The issue was whether the plaintiff did his work with ordinary care; the question whether he did it as other men did was evidentiary only.

The third question asks the jury whether the plaintiff knew that there were liable to be slivers and rough edges on the bars of brass. The coupling of these two elements together in the question was prejudicial to the plaintiff in a high degree. He admitted that he knew of the rough edges, but denied that he knew of the liability of there being slivers on the edge. Here was really the crux of the case. If he knew that slivers were liable to come at any time, it is difficult to see how it could be said that he did not assume the risk, and yet the two matters were coupled together in the question as if they were identical, so that the jury could not, by a single categorical answer, separate them.

Again, the verdict on its face is inconsistent. By their answers to questions 3 and 4 the jury found that the plaintiff knew that there were liable to be slivers on the bars and ought to have known of the danger of his glove or hand being caught on them. If these were the facts, he undoubtedly assumed the risk of the danger. On the other hand, the jury found by their answer to question 7 that he was not guilty of any want of ordinary care which contributed to the injury. Assumption of risk is held by this court to be a form of contributory negligence, and in the absence of any instruction limiting the scope of the question (and there was none in this case), a general finding of absence of contributory negligence includes the assumption of risk as well. So the verdict by necessary construction finds both ways on the question of assumption of risk. It is quite difficult also to see how the answers to questions 4 and 5 can be reasonably reconciled. The findings are

that plaintiff ought to have known that there was danger of his hand or glove being caught, but that the defendant ought not to have known that there was danger of the plaintiff's hand being drawn into the rolls as it was. Just why the plaintiff, a boy of sixteen, should be charged with knowledge of the danger that his hand might be caught, and the employer should not be charged with knowledge of the danger of the plaintiff's hand being drawn into the rolls, is not very apparent.

There are a large number of rulings upon evidence which are complained of. We shall not undertake to review them in detail. The plaintiff attempted to show by various questions asked of experts that the machine was a dangerous machine, or that it was so regarded, or that boys were not usually set at work upon it for that reason, and evidence of this character was excluded. The rulings upon this class of evidence were correct. The question whether the work was so dangerous as to require the giving of a warning was a question to be solved by the jury from the facts and circumstances in evidence. It was not a subject on which the opinion of experts was admissible. *Olwell v. Skobis,* 126 Wis. 308, 105 N. W. 777. In this connection attention is called to a ruling upon evidence adverse to the defendant, which of course is not here for review but which will probably arise upon another trial, and hence may be properly referred to in order to avoid error on such new trial. The plaintiff took the testimony of Schmelling, the foreman, under sec. 4096, Stats. 1898, before trial, and was allowed, against objection, to introduce and read the same upon the trial, although Schmelling was present and was afterwards examined as a witness. Schmelling was not an officer of the defendant, but simply an employee. This court has held such depositions inadmissible when the employee is present in court. *Hughes v. C., St. P., M. & O. R. Co.* 122 Wis. 258, 99 N. W. 897.

By the Court.—Judgment reversed, and action remanded for a new trial.

LAND AND SECURITIES COMPANY, Respondent, vs. CITY OF SOUTH MILWAUKEE, Appellant.

February 1—February 23, 1906.

Appealable orders: Practice.

1. An order in proceedings pursuant to sec. 1210*b*, Stats. 1898, staying all proceedings in the action until there can be a re-assessment of all the property of the municipality affected, is not appealable. *Maynard v. Greenfield*, 103 Wis. 670, followed and approved.
2. Sec. 1210*b*, Stats. 1898, under which such order was entered, contemplates that the action shall be closed by a judgment; and such order is a mere intermediate direction reviewable on appeal from the final judgment.
3. In such case it is suggested that it would be proper practice to enter an interlocutory judgment from which an appeal could be taken, and such judgment would prevent all prejudice to litigants that might otherwise arise under the present condition of the appeal statutes, in the administration of sec. 1210*b*, Stats. 1898.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to restrain the sale of several parcels of land owned by the plaintiff for delinquent taxes for 1900. The issues joined by the pleadings were decided, as appears from the findings, thus:

(1) The assessors of the defendant city valued plaintiff's unimproved lands for the taxes of 1900 much more than they did an equal area of unplatted land similarly situated and of like value.

(2) The valuation was according to an arbitrary rule adopted by the assessors, that a distinction should be made between platted and unplatted land; that the former by virtue merely of the condition of having been platted should be regarded, acre for acre, as far more valuable than unplatted lands of equal area.

(3) The disproportionate assessment was not made through

any bad motive, but resulted in unequal taxation in the assessment district.

(4) Many tracts of land within the assessment district by reason of such arbitrary rule were overvalued for the purposes of taxation for said year, affecting prejudicially the owners thereof, with the result that five actions similar to this one are pending for relief.

(5) Plaintiff's platted lands were assessed much higher in proportion to actual value than business property and improved residence property in the assessment district.

(6) By reason of such arbitrary distinction between platted and unplatted lands, and improved and unimproved lands, the groundwork of the tax as to all property in the assessment district is affected, throwing upon the plaintiff a heavier burden of taxation than in justice he should bear.

(7) It is impossible without a re-assessment to determine the equitable proportion of the tax levy for the year 1900 which should be paid by the plaintiff on account of his said lands.

(8) For the reasons stated, affecting the groundwork of the tax as to all property in said municipality and assessment district, such assessment and the taxes and tax proceedings based thereon should be set aside.

The court regarded such findings as making a case requiring a re-assessment of all the property in the municipality to be made under sec. 1210*b*, Stats. 1898, and accordingly ordered all proceedings in the action stayed until that could be accomplished. From that order this appeal was taken.

For the appellant there was a brief by *Quarles, Spence & Quarles,* and oral argument by *T. W. Spence.*

For the respondent there was a brief by *Wheeler & Perry,* and oral argument by *Lyman G. Wheeler.*

MARSHALL, J. It seems unfortunate that counsel overlooked *Maynard v. Greenfield,* 103 Wis. 670, 79 N. W. 407,

wherein it was decided that such an order as the one we have here is not appealable. Sec. 3069, Stats. 1898, defining appealable orders does not include such as this. It is an order affecting a substantial right made in an action, but *it does not determine the action and prevent a judgment from which an appeal may be taken.* Sec. 1210*b* under which it was entered contemplates that the action shall be closed by a judgment. It is considered that the order is a mere intermediate direction reviewable on appeal from the final judgment.

Precisely a like situation as the one before us was presented in the case cited and the appeal was dismissed. Whether such an order could reasonably be regarded as an interlocutory judgment and reviewable as such has been foreclosed so long it is considered that the principle of *stare decisis, et non quieta movere* should prevail.

We are not unmindful that one circumstanced like the appellant might be most seriously prejudiced if there was no way open for a review of the decision calling for a new assessment of all the property in the municipality with its burdensome necessary expense, and necessary disturbance of public affairs, before compliance with the decision would open the way for a final judgment. In case of such a decision being erroneous the mere correction thereof after judgment would be very inadequate relief. It would be so inefficient as to leave the municipality practically remediless for the injury inflicted by the judicial error.

The purpose of this action is to avoid the taxes on several parcels of land owned by respondent because the same were overvalued for the purpose of taxation. The sole complaint is that because of such overvaluation, unless aided by the court, respondent will be injured by having its land sold for a greater part of the tax levy for 1900 than should have been apportioned thereto. Because of the truth of such complaint, as the court found the same, and because other lands in the municipality are similarly circumstanced and all the property in

the assessment district liable to taxation is affected thereby (not prejudicially to the owners, of course, but necessarily to their advantage), the learned court held that the condition existed contemplated by the statute, as rendering necessary a re-assessment of all of the taxable property of the municipality in order to determine the plaintiff's equities. Whether that view be correct or not, might well challenge the serious attention of the court under circumstances permitting an investigation of the matter, and yet, unless the validity of the order appealed from can be inquired into in some way, prior to the entry of a final judgment, it is easy to see that large expense must necessarily be incurred and appellant laid liable to serious and irremediable prejudice. That moved the court to most carefully reconsider its former decision with the result before indicated. Such decision has remained unchallenged for some seven years. Counsel for appellant, though advised of the imminent danger of the appeal being dismissed under the rule thereof and afforded opportunity to present reasons for overruling it, failed to do so.

It does not seem that what has been said need necessarily cause serious embarrassment to appellant. The way was pointed out in *Maynard v. Greenfield, supra,* for relief in cases of this sort. Attention was called to sec. 3047, Stats. 1898, providing for an appeal in case of an interlocutory judgment, and suggesting that one was proper in such circumstances as exist here. Sec. 2883, Stats. 1898, provides for the entry of such a judgment. The two sections afford appellant a plain and adequate remedy. It was entirely competent for it to have such a judgment entered and then taken an appeal. No reason is perceived why that course cannot yet be taken. Such was the practice in *Damkoehler v. Milwaukee,* 124 Wis. 144, 101 N. W. 706. The practice suggested efficiently prevents all prejudices to litigants that might otherwise arise under the present condition of our appeal statutes, in the administration of sec. 1210*b*, Stats. 1898.

There is no other course to pursue than to dismiss this appeal, which we do, commending counsel's attention to the provisions of the statutes to which we have referred.

By the Court.—The appeal is dismissed.

MUELLER, Respondent, vs. PEW and others, Appellants.

February 1—February 23, 1906.

Wills: Probate: Undue influence: Mental capacity: Evidence: Declarations of testator: Appeal: Findings, when disturbed: New trial: Newly-discovered evidence.

1. On proceedings for the probate of a will, the evidence as to undue influence and mental capacity, stated in the opinion, is *held* to present no such clear and overwhelming preponderance against the findings of the trial court as to justify reversal.
2. On proceedings for the probate of a will, declarations of the testator tending to show the exertion of undue influence over him by the principal beneficiary are inadmissible, and, even if admitted, are not evidence of the facts so narrated by him.
3. In proceedings for the probate of a will, on an issue as to undue influence exerted on the testator, it is not sufficient to show that the testator's reason was convinced by persuasion or argument, if it is by his own will and intention that he carries that decision into effect.
4. In proceedings for the probate of a will, no reversal of a judgment admitting the will to probate can be predicated on the refusal of the court to take the verdict of the jury that sat on the trial of the cause.
5. After a will had been admitted to probate the contestants made a motion for a new trial on the ground of newly-discovered evidence predicated on the affidavit of one of contestant's witnesses to the effect that after giving her testimony she was offered a large sum of money if she would reverse it. There was nothing but suspicion to suggest that the offer came from any one in the interest of proponent. *Held*, that the motion for a new trial was properly denied, and, if a new trial was granted, such evidence would be inadmissible.

6. In such case there was also an affidavit of an employee of one of the contestants to the effect that, the morning after the death of testator, he saw proponent tear up a typewritten paper, and heard her say: "This is the last one. Now let them look if they want to." This testimony was thoroughly contradicted, both by direct evidence and by circumstances, and the employee's character was shown to be such as to entitle his statements to little weight. *Held*, in the absence of very much more direct evidence of the existence of a later will, that it could not be established by such testimony.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Contest over will of Matthias Mueller, deceased, made the 12th day of November, 1896, when he was sixty-three years of age, and two years and seven months before his death on June 11, 1899. The grounds of attack were mental incompetency and undue influence exerted by his wife, *Appolonia,* the proponent. The will disposed of approximately $30,000 worth of property; gave $500 to each of testator's seven children; and to the five children of a deceased daughter $100 each; and the residue to the proponent. The testator went to an acquaintance, Kircher, who was in the insurance and loan business, and requested him to draw his will, and stated to him the terms thereof with the names of all the beneficiaries, except that he remembered the name of one of his grandchildren only as Maggie, and was not sure as to her baptismal name, which, however, he promised to obtain so that it might be inserted. Thereupon Kircher, in the absence of testator, made or procured to be made a draft of such will, for which testator called at an appointed time, and which he took away with him and later brought back, gave the name of the unnamed grandchild as Margareth, which was inserted, and then executed the will in the presence of Kircher and his clerk. A large amount of evidence was offered by the contestants tending to show that testator was, in 1896, a sufferer from Bright's disease; that he had retired from business two or three years before,

and that many of his acquaintances noticed more or less imperfection of memory and lack of coherence in his conversation, and general feebleness, both mentally and physically, as compared with previous years. Contestants also offered evidence of many statements by deceased that his wishes as to disposal of his property, either by gifts to his children or by will, were opposed by his wife and that he could not act against her wishes. Such evidence was objected to as inadmissible upon the issue of undue influence, but perhaps proper upon mental condition. It was received subject to such objections and without ruling. There was also expert evidence from physicians, based upon various hypotheses, tending on the one hand to deny, and on the other to assert, testamentary capacity. On the issue of undue influence, except for a few trifling instances of evident obedience in household affairs by testator to his wife, the contestants' evidence mainly consisted of testimony of several of the contesting children to admissions made by the proponent that the will had been made in accordance with her requests or demands, and differently from the scheme to which testator himself was originally inclined. In defense, the making of any of these admissions was denied. The narrative of the transactions between testator and the scrivener, at which the former's wife was not present, was relied on, and the testimony of at least one witness that some two years after the making of the will testator told him of it, and expressed his belief that it was in accordance with justice and fairness. The will was admitted to probate by the county court and, upon appeal and new trial before the circuit court and a jury, at the close of the evidence the jury were excused from rendering any verdict, and the court made findings in favor of mental capacity and against undue influence, and affirmed the order of the county court. From that judgment several of the children of testator by a former wife appeal.

For the appellants there was a brief by *Fiebing & Killilea* and *Roemer & Aarons,* and oral argument by *H. J. Killilea.*

For the respondent there was a brief by *Nath. Pereles & Sons,* attorneys, and *Guy D. Goff* and *Emil G. Rahr,* of counsel, and oral argument by *Mr. C. F. Hunter* and *Mr. Rahr.*

DODGE, J. After careful examination of all the evidence, of much of which a summary is set forth in the statement of facts, we cannot bring ourselves to the view that there is any such clear and overwhelming preponderance against the findings of the court as to justify us in reversing them under the rules so often declared. Of course, the declarations made by deceased tending to show the exertion of undue influence over him by his wife were inadmissible and, even being admitted, were not evidence of the facts so narrated by him. *Loennecker's Will,* 112 Wis. 461, 88 N. W. 215. The testimony to admissions made by proponent was denied by her and the conflicting witnesses were before the trial court for its observation. The transactions attending the giving of directions to the scrivener and the execution of the will, all in the absence of the proponent, strongly refute that coercion and duress destroying the testator's freedom of will and action which is necessary to support the charge of undue influence. It is not sufficient that testator's reason is convinced by persuasion or argument, if it is by his own will and intention that he carries that decision into effect. *In re Jackman,* 26 Wis. 104; *Deck v. Deck,* 106 Wis. 470, 82 N. W. 293. On the question of mental capacity there is undisputed proof of many actual transactions by the testator near and subsequent to the date of the will entirely inconsistent with that state of mental decadence and inability which incapacitates one to make a will. These might well have convinced the trial court of his competency as against even less doubtful opinion evidence than that introduced by contestants in this case, especially referring to that of the medical experts which was based on the much disputed hypothesis of inability to remember or talk coherently. *In re Butler's Will,* 110 Wis. 70, 78, 85 N. W. 678.

Further discussion of these questions of fact would be unprofitable. It is all summed up in the statement already made that we find no preponderance of evidence against the findings and therefore cannot disturb them.

No reversal can be predicated on declining to take verdict of the jury. Such verdict would have been advisory merely, leaving the duty still upon the trial court to decide all questions of fact according to his own judgment. How the situation could have been varied to the benefit of appellants by receiving such a verdict is not apparent.

A motion for new trial on the ground of newly-discovered evidence was predicated on an affidavit of one of contestants' witnesses that, after giving her testimony, she was offered a thousand dollars if she would reverse it. There is nothing but suspicion to suggest that the offer came from any one in the interest of the proponent. Hence such testimony would be wholly inadmissible if a new trial were granted. There was also an affidavit of an employee of one of the contestants to the effect that he saw proponent tear up a typewritten paper the morning after her husband's death, and heard her say to her daughter: "This is the last one. Now let them look if they want to." This is supposed in some way to justify a suspicion that such paper may have been a later will. It is entirely obvious, however, that, in the absence of very much more direct evidence of the existence of such a document, this testimony could by no means establish it. Hence no different result could be expected if such testimony were admitted. It should perhaps be said that the statement of this employee was very thoroughly contradicted, both by direct evidence and by circumstances, and his character was shown to be such as to entitle his statements to very little weight.

Without considering the more technical grounds which would support the conclusion of the court on this motion, we think it was properly overruled for the reasons above stated.

By the Court.—Judgment affirmed.

MEYER and another, Respondents, vs. HOME INSURANCE COMPANY and others, Appellants.

February 2—February 23, 1906.

Appeal and error: Findings, when disturbed: Fire insurance: Loss: Provisions of policy: Fraud: False swearing: Special verdict: Records of internal revenue department: Admissibility: Secondary evidence: Actions: Conditions precedent: Exceptions: Objections, how taken.

1. Respecting the question whether a verdict is sustained by the evidence, and the ruling of the lower court thereon, the supreme court will set aside the findings of the jury only when there is no evidence to sustain the verdict, or where, though there be some evidence in its support, still the great weight of the evidence is against it, and that weight is so reinforced by all the reasonable probabilities and inferences that it becomes overwhelming.
2. In an action to recover for loss under an insurance policy containing a provision: "This entire policy shall be void in case of any fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after loss," the court instructed the jury: "If you find that the plaintiffs wilfully included in the proofs of loss property removed by them, and such removal or disposition *would secure no advantage to the plaintiffs* in the adjustment and payment of the loss under the policy of insurance, *to the prejudice or injury of the defendants*, and would not be liable to have *that effect*, then there is no legal fraud, unless you find that such acts on the part of the plaintiffs were liable to deceive the defendants and cause them to pay more than they in justice ought to pay," which instruction was given in connection with a question of the special verdict: "Did the plaintiffs, prior to the fire, remove from their factory or dispose of any tobacco or cigars which they afterwards knowingly, wilfully, and with intent to defraud the defendants included in their proofs of loss." *Held*, that such instruction, under the circumstances disclosed by the evidence, stated in the opinion, was not a proper statement of the law, was misleading, and therefore prejudicially erroneous.
3. In such case the fact that the jury found that the amount of plaintiffs' property was more than the amount of loss does not render the instruction any less prejudicial.

4. Under a clause in a fire insurance policy: "This entire policy shall be void in case of any fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after loss," the presence of the words "false swearing" in connection with the word "fraud" indicates that either wilful fraud or false swearing is designed to have the effect of defeating the policy, regardless of the ultimate effect of the false swearing upon either party to the contract.
5. In such clause the word "fraud" is used in connection with the words "false swearing" to cover frauds otherwise than by false swearing.
6. It is error to intimate or make known to a jury the effect of their answers to questions submitted in a special verdict.
7. Under the laws of the United States and the rules and regulations of the treasury department made in pursuance thereof, respecting internal revenue, the officers of the department cannot be compelled to produce their books in evidence or disclose their contents, and copies of such books are not obtainable except under the regulations prescribed by the department. *Held*, that no effort having been made to obtain evidence contained in such books in the manner provided by law, and the records themselves not being admissible, it was not error to exclude testimony of a witness who had examined such books as to their contents.
8. Such records being privileged and to a certain extent *quasi*-confidential communications, a litigant has no right to the use thereof upon any other basis than such as may be fixed by the United States or under its authority.
9. In an action on fire insurance policies containing a provision that the assured should submit to examinations under oath as often as required, it appeared from the record that one of the plaintiffs appeared before a court commissioner and submitted to an examination of considerable length; that as to many inquiries it did not appear that the witness had personal knowledge of the facts about which she was interrogated, and frankly admitted she did not know, but proffered examination of her manager, whom she said knew the facts, and also offered all books and information under her control. *Held*, there was no violation of such provision of the policies, and no error, predicated on such violation, was committed in failing to hold that the action was prematurely brought.
10. It appeared from the record returned on appeal that it contained a statement that appellants duly excepted to portions of the charge to the jury underscored in the body of the charge; that

the portions of the charge relied upon as excepted to were underscored, and, in the bill of exceptions, that there were particular specifications of the portions of the charge excepted to, setting out under separate heads the language complained of. *Held*, that the exceptions were sufficiently taken.

11. Appellant has a right to make specific objection to the particular part of the charge objected to, and is not obliged to embrace parts of the charge not objectionable in the exception for the purpose of completing a sentence under a separate exception.

12. The object of exceptions is to bring to the attention of the court the particular matter objected to.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

The plaintiffs commenced separate actions against the defendants, which were consolidated and tried together, the questions in controversy being the same in each case. The actions were brought upon insurance policies to recover for loss of a stock of cigars, tobacco, fixtures, and machinery, and the defense made to each was that the plaintiffs were guilty of fraud or false swearing within the terms of the policies. The stock covered by the insurance, exclusive of machinery and fixtures, was insured by defendants at the sum of $10,600. The fire which damaged the property insured occurred about midnight December 17, 1901. Plaintiffs claimed in their proofs, made and served, that the loss on cigars was $9,306.45 and on tobacco $3,602.34. The case was tried by the court and a jury and a special verdict returned, which found that the value of the tobacco destroyed and damaged by fire was $3,152.10 and that the value of the cigars destroyed and damaged was $6,516.20. The jury further found that the plaintiffs prior to the fire did not remove from the factory or dispose of any tobacco or cigars which they afterwards knowingly, wilfully, and with intent to defraud included in the proofs of loss, and that the value of the tobacco and cigars destroyed was not overstated by plaintiffs knowingly, wilfully, and with intent to defraud the defendants. Motions were

made to change the answers to the questions, and to amend the verdict and for judgment in favor of the defendants, and to set the verdict aside and for a new trial, which were denied, and judgment for plaintiffs rendered upon the verdict, from which this appeal was taken.

For the appellants there was a brief by *Fiebing & Killilea,* attorneys, and *J. H. Roemer,* of counsel, and oral argument by *Mr. Roemer* and *Mr. H. J. Killilea.*

For the respondents there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz* and *Robert Wild.*

KERWIN, J. 1. Error is assigned because the court refused to direct a verdict for defendants and in not amending the verdict and ordering judgment upon it as amended in favor of defendants. This assignment involves the question whether the evidence sustains the findings of the jury that the plaintiffs did not knowingly, and with intent to defraud, include in their proofs of loss property which, prior to the fire, had been removed from the factory or disposed of, and that the value of the property included in the proofs of loss was not wilfully overstated with intent to defraud the defendants. It is strenuously insisted by appellants that a large quantity of cigars and tobacco had been removed from the stock, disposed of, and included in the proofs of loss, and that the jury by their finding that the value of the tobacco and cigars destroyed and damaged was $3,340 less than claimed in the proofs of loss, in effect found that cigars had been taken out of stock and disposed of prior to the fire and included in the inventory and proofs of loss. There is considerable evidence on the part of the defendants which tends to support this contention, while on the part of the plaintiffs there is evidence tending to contradict it. Under the proof submitted the jury might well have found that the property damaged and destroyed was much less than the amount stated in the proofs of loss and yet

impute no bad conduct to the plaintiffs. It is very clear from the verdict that they did not intend to charge plaintiffs with wilfully including in the proofs of loss property not destroyed or overstating the value of the property included, because in their verdict they specifically so found. We have had much difficulty in endeavoring to reconcile the evidence upon the material controverted issues upon the subject under discussion, but are unable to come to the conclusion that the findings of the jury are so far unsupported by the evidence as to warrant us in disturbing them. This court will set aside the findings of the jury and the ruling of the lower court respecting the question whether the verdict is sustained by the evidence only when there is no evidence to sustain the verdict or findings of the jury "or where, though there be some evidence in its support, still the great weight of the evidence is against it, and that weight is so reinforced by all the reasonable probabilities and inferences that it becomes overwhelming." *Bannon v. Ins. Co. of N. A.* 115 Wis. 256, 91 N. W. 666; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382, 80 N. W. 471.

2. Error is assigned because of the following instruction:

"If you find that the plaintiffs wilfully included in the proofs of loss property removed by them, and such removal or disposition would secure no advantage to the plaintiffs in the adjustment and payment of the loss under the policy of insurance, to the prejudice or injury of the defendants, and would not be liable to have that effect, then there was no legal fraud as referred to in this question, unless you find that such acts on the part of the plaintiffs were liable to deceive the defendants and cause them to pay more than they in justice ought to pay."

Each policy contained the following provision:

"This entire policy shall be void . . . in case of any fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

The vital question litigated upon the trial was whether there was any fraud or false swearing within the meaning of the foregoing provision. The plaintiffs, to verify their claim of loss, presented to the adjusters their books of account and inventories for the purpose of showing the amount of property on hand at the time of the fire, and it is claimed by defendants that the amount of property so represented as being destroyed and damaged was not in fact on hand or damaged or destroyed. Plaintiffs also made and furnished to defendants verified proofs of loss in which the amount of the loss on tobacco and cigars was stated to be $3,340 more than the amount of the loss as found by the jury, and more than the amount in fact on hand as claimed by defendants. One of the main questions litigated upon the trial, therefore, was whether the plaintiffs, prior to the fire, had removed from the factory or disposed of tobacco or cigars which they afterwards knowingly, wilfully, and with intent to defraud included in the proofs of loss. And upon this issue the court submitted to the jury the following question:

"Did the plaintiffs, prior to the fire, remove from their factory or dispose of any tobacco or cigars which they afterwards knowingly, wilfully, and with intent to defraud the defendants included in the proofs of loss?"

Upon the issue thus raised by this question there was a sharp contest, and the question arises whether the instruction under consideration was a proper statement of the law under the circumstances disclosed by the evidence. It is claimed on the part of the defendants that the plaintiffs were guilty of fraud in representing the amount of property destroyed and false swearing in making their proofs of loss, and there was evidence sufficient to go to the jury upon this question. The evidence properly raised the question submitted; hence it was necessary that the jury be clearly instructed upon the law respecting these controverted facts. The question submitted to the jury embraced a clear statement of the facts necessary to

constitute fraud or false swearing within the meaning of the policy. Whether these facts existed or not was for the jury, and whether, if there was false swearing, it secured any advantage to the plaintiffs in the adjustment and payment of the loss to the prejudice or injury of the defendants was not embraced in the question, and was a matter of no concern to the jury. An instruction respecting the same could serve no proper purpose, and was liable to mislead in view of the testimony in the case. The evidence tended to show that the property damaged and destroyed was less than that included in the proofs of loss. The main point in issue, therefore, was whether plaintiffs had removed or disposed of property which they afterwards knowingly, wilfully, and with intent to defraud included in the proofs of loss. If there was false swearing within the meaning of the policy, it was immaterial whether plaintiffs derived any advantage to the prejudice of the defendants in consequence thereof or not. This is in accordance with the plain terms of the policy. The use of the words "false swearing" in connection with the word "fraud" plainly indicates that either fraud or false swearing was designed to have the effect of defeating the policy, regardless of the ultimate effect of the false swearing upon either party to the contract. False swearing, when knowingly and wilfully done with intent to defraud the insurer, avoids the policy regardless of the ultimate effect of such false swearing, and it is very plain that the word "fraud" was used in connection with the words "false swearing" so as to cover frauds otherwise than by false swearing. It is clear that if the words "false swearing" be given their plain, ordinary meaning they cannot be held to mean that it was only "false swearing" which worked an advantage to the insured to the prejudice or injury of the insurer in the adjustment and payment of the loss that can avoid the policy. If the plaintiffs knowingly and wilfully, with intent to defraud the defendants, swore falsely in making the proofs of loss, such act amounted to a fraud

upon the defendants which avoided the policies, irrespective of the ultimate effect upon the defendants. If the false swearing must secure an advantage to the insured in the adjustment and payment of the loss to the prejudice or injury of the insurer in order to avoid the policies, the purpose of this provision would, in many cases, be nullified, because the insured, after swearing falsely to proofs of loss in order to recover more than his honest loss, could escape the consequences of his act in case of discovery of such false swearing before payment by the insurer. Such a construction would defeat the object of this wholesome provision designed to prevent fraud and false swearing, and is wholly inconsistent with its purpose and policy. *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57; *Moore v. Va. F. & M. Ins. Co.* 28 Grat. 508. The court told the jury in the instruction under consideration, in substance, that if they found that the plaintiffs wilfully included in the proofs of loss property formerly removed by them, and such removal or disposition would secure no advantage to the plaintiffs in the adjustment and payment of the loss to the prejudice or injury of the defendants, and would not be liable to have that effect, there was "no legal fraud as referred to in this question," unless such acts were liable to deceive the defendants and cause them to pay more than they ought to pay. The court by the instruction attempted to define the legal fraud referred to or covered by this question, and injected into it an element wholly foreign to the subject and one well calculated to confuse and mislead the jury. Including in the proofs of loss property not destroyed or damaged by the fire was manifestly liable to deceive the insurer and cause it to pay more than it ought to pay, and the only question was whether such act was done wilfully and with intent to defraud the insurer. *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 91 N. W. 666. The distinction between actions based upon fraud and fraud or false swearing, within the meaning of the clause in the policy in

question which forfeits it, is clearly pointed out in *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 56, 71 N. W. 74:

"No authority can be found, we may safely say, to sustain the contention that fraud which will avoid a policy under such a clause must have the elements necessary to constitute a cause of action based on fraud. Where the deception or artifice practiced results in payment of the loss, in an action brought to recover back the money all the conditions which the learned judge held requisite to make out fraud would be essential to sustain the cause of action. His difficulty grew out of a failure to distinguish between deception and artifice constituting fraud liable to do harm, which avoids a policy of insurance under a contract which so provides, and a cause of action based on fraud."

We think the case at bar is ruled by *F. Dohmen Co. v. Niagara F. Ins. Co.* and *Bannon v. Ins. Co. of N. A., supra,* and that the reasoning of these cases is particularly applicable to the facts here. In the *Bannon Case,* at page 260 (91 N. W. 669), the court said:

"The intentional falsification of books or statements showing a greater amount of property on hand than the fact was, and submission of such books or statements to the adjusters as correct, fulfils every requirement of the condition avoiding the policy, regardless of the fact whether damages actually resulted to the insurance company. Such an act is manifestly liable to deceive the insurer and cause him to pay more than he in justice ought to pay, and the only questions left for the jury are whether it was done, and, if so, whether it was intentionally and wilfully done."

Commercial Bank v. Firemen's Ins. Co. 87 Wis. 297, 58 N. W. 391; *Maher v. Hibernia Ins. Co.* 67 N. Y. 283; *Shaw v. Scottish Comm. Ins. Co.* 1 Fed. 761; and *Claflin v. Comm. Ins. Co.* 110 U. S. 81, 3 Sup. Ct. 507, relied upon by counsel for respondents, are considered in the *Dohmen Case,* and further discussion of them would seem unnecessary. Some of the other cases cited by counsel for respondents are where the action was based on fraud and where all the elements of an action for deceit were necessary to be proved; others are where

the overvaluation or false swearing was not wilful, or with intent to defraud, or for the purpose of obtaining undue advantage over the insurer, and the circumstances were not such as to be liable to have that effect. Such cases are clearly inapplicable here, as pointed out by Mr. Justice MARSHALL in the *Dohmen Case*. It is also claimed on the part of the respondents that since the amount of insurance upon the tobacco and cigars was more than the amount of loss as found by the jury, the appellants could not be prejudiced by the instruction. But this does not follow. If there was false swearing within the meaning of the policy, as heretofore defined, the entire policy would be forfeited and the plaintiffs could not recover any amount, regardless of the amount of insurance as compared with the actual loss, or whether they derived an advantage or defendants sustained a loss in consequence of such false swearing. This is the plain purpose and policy of the provision. *Moore v. Va. F. & M. Ins. Co.* 28 Grat. 508; *Phœnix Ins. Co. v. Munday*, 5 Cold. 547; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57; *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 56, 71 N. W. 69; *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 91 N. W. 666. The instruction under consideration upon the facts in this case was not a proper statement of the law, was misleading, and therefore constitutes reversible error. It clearly gave the jury to understand that false swearing was not sufficient to avoid the policy unless they found that the plaintiffs secured some advantage in the adjustment and payment of the loss under the policy of insurance to the prejudice or injury of the defendant, or would be liable to have that effect.

3. Error is assigned because the court charged the jury as follows:

"As to the third, fourth, and fifth questions, the burden of proof is upon the affirmative of the question, and, inasmuch as such affirmative answer will prove fraud, you will not answer," etc.

This portion of the charge is excepted to because the court told the jury the legal effect of their answer to the question. It is claimed, however, on the part of the respondents that the error, if error were committed, was cured by other portions of the charge in which the court specifically told the jury that they must not consider what effect their answers to the questions would have upon the final result in the case—that such matter was exclusively for the court. The purpose of a special verdict is to obtain from the jury findings upon material issuable facts in the case, and the legal effect of such findings is exclusively for the court. It is not necessary to consider whether the charge to the jury instructing them that they were not to consider the effect of their answers was sufficient to prevent the language excepted to working reversible error, since there must be a new trial regardless of this assignment. It is sufficient to say that the practice of intimating to the jury, or making known to them, the effect of their answers to questions submitted in the special verdict has been held error. *Coats v. Stanton,* 90 Wis. 130, 62 N. W. 619; *Ryan v. Rockford Ins. Co.* 77 Wis. 611, 46 N. W. 885; *Kohler v. West Side R. Co.* 99 Wis. 33, 74 N. W. 568; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442; *Conway v. Mitchell,* 97 Wis. 290, 72 N. W. 752; *Chopin v. Badger P. Co.* 83 Wis. 192, 53 N. W. 452; *Reed v. Madison,* 85 Wis. 667, 56 N. W. 182.

4. Error is assigned because of the exclusion of testimony of one W. J. Greer, who was called to testify respecting the government books kept in the internal revenue department in Milwaukee, showing the transactions of plaintiffs with the government before the fire. Before Greer was sworn one Saveland, deputy internal revenue collector, was called as a witness and requested to produce the books of the department showing plaintiffs' returns to the government of the amount and kind of tobacco destroyed. The witness testified that under the rules of the department he was not permitted to dis-

close or produce the books, after which the appellants sought to prove by the witness Greer that he had read the entry made in the government books showing the amount and kind of tobacco which it was claimed was destroyed by fire, and that he remembered the entry as to the number of pounds and kind of tobacco destroyed, and, upon being asked to state what the entry was, the question was objected to and the evidence excluded. The testimony of this witness does not appear to have been very specific regarding the identity of the book which he examined, nor whether it came from the proper custodian. It was argued on the part of the appellants that they were entitled to this evidence, it being the best evidence, since they were unable to produce the original records; but we do not deem it necessary to discuss the question as to how far secondary evidence may be admissible in cases of public records, where such records cannot be produced, because we are well satisfied that neither the original record in this case nor secondary evidence of its contents was admissible in evidence, except in the manner provided by law. Under the rules of the department the collectors are prohibited from giving out such records or copies thereof or producing such records or copies in state courts, except that, where copies of documents or records are desired on behalf of parties to a suit, such copies shall be furnished only on a rule of the court upon the secretary of the treasury requesting the same. *Boske v. Comingore*, 177 U. S. 459, 20 Sup. Ct. 701. The records, therefore, were privileged and to a certain extent *quasi*-confidential communications. *In re Comingore*, 96 Fed. 552. A litigant has no right to the use of such record upon any other basis than such as may be fixed by the United States or under its authority. Under the laws of the United States and the rules and regulations made in pursuance thereof, the officers of the departments could not be compelled to produce the books in evidence or disclose their contents, and they were not admissible, except in the manner provided by the department. *In re Comingore, supra; Boske v. Comingore, supra.* The records themselves

not being admissible, secondary evidence of their contents could not be admitted. 1 Greenl. Ev. § 251; *Gray v. Pentland,* 2 Serg. & R. 23, 29; *Yoter v. Sanno,* 6 Watts, 164, 166. It does not appear that any effort was made on the part of the appellants to obtain this testimony in the manner provided by law. It follows that the evidence of the witness Greer was not admissible and that no error was committed in excluding it.

5. Error is assigned because the court erred in not holding that the action was prematurely brought. It is claimed by appellants that under the provision of the policy—"the insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations, all under oath, by any person named by this company, and subscribe the same," etc.—one of the plaintiffs, *Myrtle S. Meyer,* upon examination before a court commissioner, under advice of counsel refused to ascertain or furnish information relating to the subject matter of insurance, and that no action could be maintained until the insured had complied with this provision. It appears from the record that the witness was summoned before a court commissioner and submitted to an examination of considerable length, apparently answering so far as she had knowledge. But in many instances she answered to the effect that she had no knowledge, and referred the defendants to her manager and the books of the concern. It does not appear that the witness had much personal knowledge of the facts about which she was interrogated and frankly admitted that she did not know, but proffered examination of her manager, whom she said knew the facts, and also offered all books and information under her control. From a careful examination of the record we are unable to see that there was any violation of the provision of the policy referred to under this assignment of error. We are of the opinion that no error was committed in not holding that the action was prematurely brought.

6. It is further claimed that no exceptions were taken to the charge, and that the record is to the effect that defendants excepted to the portions of the charge printed in italics. We find, however, on examination of the record that there is a statement to the effect that defendants duly excepted to the portions of the charge underscored in the body of the charge, and also find the portions of the charge relied upon as excepted to underscored, and, in addition to this, there appears to be in the bill of exceptions particular specifications of the portions of the charge excepted to, setting out under separate heads the language complained of. It is also said that the exceptions are meaningless if taken by themselves, and if taken out of the charge would leave it meaningless. We do not regard this contention tenable. Appellants had a right to make specific objection to the particular part of the charge objected to, and were not obliged to embrace parts of the charge in the exception not objectionable, for the purpose of completing a sentence under a separate exception. The object of exceptions is to bring to the attention of the court the particular matter objected to.

It does not seem necessary to consider other errors assigned.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

HUPFER, Administrator, Respondent, vs. NATIONAL DISTILLING COMPANY, Appellant.

February 2—February 23, 1906.

Appeal and error: Direction of verdict: Experts: Qualification: Evidence: Competency: Photographs: Identification: Cross-examination: Redirect examination: Instructions to jury.

1. Where, on a first appeal, a judgment in favor of plaintiff was reversed for error, on a second appeal a judgment of nonsuit was reversed and a new trial ordered, and on the third appeal

the evidence was close upon some material questions, it cannot be said, as matter of law, that there is error in refusing to direct a verdict in favor of defendant.

2. In an action for the death of plaintiff's intestate, caused by the bursting of a wooden tank containing distilling slops, plaintiff interrogated a witness called as an expert as to the liability of lactic acid in the slops percolating through the tank and corroding the iron hoops. *Held*, under the evidence, stated in the opinion, that the witness was not qualified to testify as an expert and that the admission of his testimony was error.

3. Where, on a former appeal, photographs were held improperly admitted in evidence because the evidence did not sufficiently identify the subject photographed, and, on a subsequent appeal, in view of the testimony on the second trial, it was held error to exclude such photographs, and on the instant appeal it appeared that the evidence tending to establish such identity was much more full and convincing than on the last previous trial, it was *held* that the photographs were properly admitted in evidence, and that there was no error in refusing to strike them out.

4. It is error to exclude answers to questions put on redirect examination explaining a witness's testimony on a former trial, where the witness has been asked on cross-examination as to what was his testimony on such former trial.

5. Such error is cured by a subsequent offer, with the acquiescence of the court, to allow such testimony to be given without objection and the declination of such offer.

6. An instruction to the jury: "The burden of proof as to the second question and as to *every other question* of this verdict *except the last question*—being the one in regard to damages,—is upon the affirmative; that is to say, you will not answer any of these questions by 'Yes' unless you are satisfied by the preponderance or greater weight of all the evidence in the case that the fact or facts which you find by such affirmative answers are true and correct," is misleading and erroneous, and equivalent to saying that upon the question of damages the burden of proof is not upon the party seeking to establish the affirmative, and is *held* not cured by specific instructions on the question of damages.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action is brought to recover damages for the death of

the plaintiff's intestate September 13, 1899, caused by the bursting of a large circular tank or vat containing distilling slops. This case has been here on two former appeals and the facts involved and the questions determined may be found in 114 Wis. 279, 90 N. W. 191, and 119 Wis. 417, 96 N. W. 809. At the close of this last trial the jury returned a special verdict to the effect (1) that Simon Hupfer died September 13, 1899, on account of injuries sustained by the bursting of defendant's slop vat on said day; (2) that at the time of the bursting of said vat the hoops on said vat were so rusted as to be defective and unfit for the purpose for which they were used; (3) that the defendant knew of such defective condition of said hoops in time to have remedied such defects before the accident; (4) that the defendant in the exercise of ordinary care ought to have known of such defective condition of said hoops in time to have remedied same before the accident; (5) that such defective condition of said hoops was the proximate cause of the injury to deceased; (6) that the deceased, Simon Hupfer, was not guilty of any want of ordinary care which contributed to the injury resulting in his death; (7) that they assessed the plaintiff's damages at $4,000. From the judgment entered in favor of the plaintiff upon such verdict for the amount stated, with costs, the defendant appeals.

For the appellant there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz* and *Robert Wild.*

Joseph B. Doe, for the respondent.

CASSODAY, C. J. 1. This case has been here upon two former appeals. 114 Wis. 279, 90 N. W. 191; 119 Wis. 417, 96 N. W. 809. On the first appeal the judgment in favor of the plaintiff was reversed for error. The second appeal was from a judgment of nonsuit, and the same was reversed and the cause was remanded for a new trial. It is now urged,

among other things, that the trial court erred in refusing to direct a verdict in favor of the defendant on the merits. This claim was presented and to some extent considered on both of the former appeals. The evidence is close upon some material questions, but it cannot be said, as a matter of law, that there was error in refusing to direct a verdict in favor of the defendant. Nor can we say from the undisputed evidence that there was error in refusing to set aside the answers of the jury to the second, third, fourth, fifth, and seventh questions of the special verdict, and, when so amended, to enter judgment thereon in favor of the defendant.

The plaintiff's witness, Mitchell, as a chemical expert, testified that he never had any experience or practical knowledge in ascertaining as to how thick a healthy and sound board or plank might be to permit lactic acid or slop containing lactic acid to penetrate it; that he never experimented to ascertain whether seventy-two one-hundredths of one per cent. of lactic acid contained in a fluid would seep through a healthy two-inch plank, and never made any experiment at all in that line; that he knew something about the seepage of lactic acid in dilution with aqueous infusion from actual experience; that as far as the wood was concerned and as far as water of that temperature was concerned, the slop mentioned would not seep more than water; that water of that temperature would have about the same amount of seepage; that the lactic acid would not add to the seepage quality through the wood appreciably; and that he knew that water would not seep through a tub or vat constructed of sound three-inch staves tightly clasped together, so that it would percolate through the wood or leak appreciably. After so testifying the witness was allowed, against objection, to answer the question whether, under the conditions described, the lactic acid in the slops would percolate or seep through the staves of such tub to any extent; and in giving such testimony he stated, in effect, that he knew there would be more or less seepage, and in case of

the vat described and the character of the slops mentioned there would be an effect upon the hoops on account of such seepage and percolation, and that the hoops would be corroded or eaten thereby. Such testimony was upon a vital point in the case, and we are constrained to hold that the witness was not qualified to so testify as such expert, and hence that the ruling so complained of was error.

2. Error is assigned for admitting in evidence photographs of what the plaintiff claims to have been the same hoops which were around the tank at the time it burst, and for refusing, at the close of all the testimony, to strike such photographs from the record. The admission of such photographs has been one of the controverted questions from the beginning. On the first appeal it was held that the photographs were improperly admitted in evidence because the evidence did not sufficiently identify the hoops so photographed as the hoops in question. On the second appeal it was held to be error to exclude testimony tending to prove that four or five days after the accident the defendant's chief engineer and superintendent of machinery and apparatus, on the request of the plaintiff's attorney, pointed out the hoops photographed, and stated that they were the same hoops which came from the broken tank. On the same appeal it was said by this court, in effect, that a comparison of the evidence of identification of the hoops photographed contained in the printed case on the first appeal with that on the second appeal showed "a very marked difference, not only in the specific facts of which testimony" had been "given, but also in respect to the clearness and definiteness of evidence to facts which were in some degree suggested in the former case." It was also stated that the trial court "was mistaken" in supposing that the decision of this court on the first appeal required that court to exclude the photographs, notwithstanding they were sufficiently identified, in the judgment of that court. Then, after considering the evidence bearing upon the question of such identity

and the advantages of the trial court over this court in determining such questions, it was said:

"The question of identification, as preliminary to the admissibility of the photographs, was, however, one for the court and not primarily for the jury, and, so far as it was a question of fact, the conclusion of the trial court upon the evidence must be given great weight upon appeal—substantially the same weight as is given that court's findings upon other issues tried without a jury."

And again:

"In view of the deference due to a deliberate conclusion by the trial court as to sufficiency of the identification, we might hesitate, even in the present case, to overrule such conclusion and hold it reversible error. Resolution of the doubt on that question is, however, not necessary, as reversal must result upon other grounds, and upon a new trial the positive identification by defendant's engineer may substantially vary the situation."

It is enough to say that upon this last trial the evidence tending to establish such identity was much more full and convincing than on the last previous trial; besides, there was one additional witness who had not testified in the case before by reason of being absent in a distant territory. We are constrained to hold that the photographs were properly admitted in evidence and that there was no error in refusing to strike them out.

3. Error is assigned for excluding testimony of the defendant's superintendent. It appears that upon cross-examination the plaintiff's counsel asked the witness as to what he testified, on the former trial before Judge LUDWIG, as to the condition in which he found the slop vat when he examined the same with a knife. And he was then asked by defendant's counsel on redirect examination whether at the time and in connection with such testimony he was asked how he found the iron and whether he did not answer that he found it in good condition; and whether he had not stated that the hoops were painted

black and the staves brown; and that the tub had been painted before, but he could not tell when. But such questions were excluded; and the defendant's counsel was not allowed to read the questions put to the witness nor the answers made by the witness for the purpose of explaining some of the testimony that the plaintiff's counsel had referred to as having been given on the former trial before Judge LUDWIG. It seems to be well settled that:

"After a witness has been cross-examined respecting a former statement made by him, the party who called him has a right to re-examine him to the same matter. The counsel has a right, upon such re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but he has no right to go further and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness." 1 Greenl. Ev. (15th ed.) § 467. See *Smith v. Milwaukee E. R. & L. Co., ante,* p. 253, 106 N. W. 829.

We must hold that the exclusion of such re-examination was error.

Counsel for the defendant also assigns a similar error because the court refused to allow the same witness to explain his testimony given before the coroner and to which his attention had been called on cross-examination by the plaintiff's counsel. But the defendant is in no position to insist upon such error, since at the close of the testimony counsel for the plaintiff offered, in open court, to allow the defendant's counsel, if he desired, to read to the jury any of the testimony of the witness so taken before the coroner, without any objection on his part; and the court thereupon stated that, if there was anything in that record which the defendant's counsel desired to read, he might read it; but the defendant's counsel declined such offer.

4. Error is assigned because, after defining the burden of proof, the court charged the jury that:

"The burden of proof as to the second question, and as to *every other question* of this verdict *except the last question*—being the one in regard to damages,—is upon the affirmative; that is to say, you will not answer any of these questions by 'Yes,' unless you are satisfied by the preponderance or greater weight of all the evidence in the case that the fact or facts which you find by such affirmative answer are true and correct."

That was equivalent to saying that upon the question of damages the burden of proof was not upon the party seeking to establish the affirmative. Certainly such burden was not on the defendant. The portion of the charge quoted left the jury to infer that it was not on the plaintiff. The whole purpose of the action was to recover damages. And in another portion of the charge the jury were told that under no circumstances could they "give the plaintiff damages in excess of $5,000." Of course, the question whether damages were sustained was a question of fact to be determined by the jury from the evidence, and the burden of furnishing such evidence was on the plaintiff. We are constrained to hold that the portion of the charge thus quoted was misleading and hence erroneous. True, the court specifically charged the jury on the question of damages, but that did not cure the error mentioned. We find no other question of sufficient importance to call for consideration.

By the Court.—By reason of the errors mentioned the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

GRIEB and another, Respondents, vs. KOEFFLER and another, Appellants.

February 2—February 23, 1906.

Brokers: Contract: Performance: Evidence: Admissibility: Appeal and error: Curing error: Increased value.

1. When a broker contracts to procure a purchaser for real estate on commission it is not essential that he should himself bring the purchaser bodily to the owner, but it is sufficient if through his efforts a person is found within the time limited, or if no time is limited within a reasonable time, who comes to the owner ready and willing to purchase the property at the required price.
2. In an action by real-estate brokers for commissions, the evidence, stated in the opinion, is *held* sufficient to sustain a verdict for plaintiffs.
3. In an action by real-estate brokers for commissions, it was claimed by the defendant that the sale was in fact made through the efforts of another broker, and the defendant was asked to state the circumstances under which an option, which preceded the sale, was finally made, and a general objection to the question was sustained. *Held* error, but cured by subsequent testimony.
4. In an action by real-estate brokers to recover commissions, under the evidence it is *held* that the rule that where the condition or value of the property has materially changed between the first interview with the broker and the time of the sale it is the duty of the broker to consult his principal and ask for new instructions before making a sale, had no application.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action to recover commissions upon the sale of real estate. It appeared by the evidence that the plaintiffs were partners in the real-estate business in Milwaukee, and that the defendants owned a number of lots in the village of North Milwaukee which they desired to sell. In the latter part of June, 1902, some conversation took place between the

plaintiffs and the defendant *Hugo Koeffler* concerning these lots. The plaintiffs claim that the defendant *Koeffler,* who was acting for himself and the other defendant, put the lots in the plaintiffs' hands for sale, and agreed that if a purchaser was obtained for more than $6,500 the plaintiffs should receive as their commission all that was realized over that sum. The defendants, on the other hand, claim that they made no such agreement, but simply stated to the plaintiffs that they would sell the lots to them for $6,500 net. Subsequently, and in the month of October following, the defendants in fact sold the lots to one Kootz for $8,000, and the plaintiffs claim that they procured Kootz as a purchaser, and this action is brought to recover the sum of $1,500 as their commission. The following special verdict was rendered:

"(1) Did the defendant *Hugo Koeffler* make an agreement with the plaintiffs that, if plaintiffs would procure a purchaser for defendants' land in North Milwaukee, defendants would pay plaintiffs for such services all that defendants would realize on a sale of said land to such purchaser over and above $6,500? *A.* Yes. (2) If you answer the first question yes, had the defendant *Hugo Koeffler* authority to make such agreement for and in behalf of his brother, *Charles A. Koeffler?* That is answered by the court in the affirmative by consent of the parties. (3) If you answer the first question yes, was the authority of the plaintiff to procure a purchaser for said land revoked by the defendant *Hugo Koeffler* at any time before October 11, 1902? *A.* No. (4) Were the plaintiffs the procuring cause of defendants' sale of land to William Kootz? *A.* Yes. (5) Under all the circumstances, and in view of a lapse of time between June 19 and October 11, 1902, were the defendants justified in assuming that the plaintiffs had abandoned finding a purchaser for this land? *A.* No. (6) Was the plaintiff *Grieb,* before October 11, 1902, employed by William Kootz for a commission to procure land for said Kootz in North Milwaukee? *A.* No."

The defendants made proper motions for nonsuit, also to direct a verdict, also for a new trial; all of which motions be-

ing overruled, judgment was rendered upon the verdict for the plaintiffs, and the defendants appeal.

C. A. Koeffler, Jr., for the appellants.

For the respondents there was a brief by *A. H. Blatchley*, attorney, and *J. W. Wegner*, of counsel, and oral argument by *Mr. Blatchley*.

WINSLOW, J. When a real-estate agent contracts to procure a purchaser for real estate upon commission it is not essential that he should himself bring the purchaser bodily to the owner of the real estate, but it is sufficient if through his efforts a person is found within the time limited, or if no time is limited within a reasonable time, who comes to the owner within such time ready and willing to purchase the property at the required price. There was sufficient evidence to entitle the jury to find that the purchaser Kootz in the present case was procured through the efforts of the plaintiffs; indeed, there was sufficient evidence to sustain all the findings of the special verdict.

No exceptions were reserved to the charge of the court, and the only ruling upon evidence which deserves special treatment will be briefly noticed. The defendants claimed that the sale to Kootz was in fact made through the efforts of one Place, and the defendant *Hugo Koeffler* was asked by his counsel to state the circumstances under which the option was finally made to Mr. Kootz, and a general objection to the question was sustained. This was an erroneous ruling, because it was certainly competent for the defendants to show, if they could, the circumstances under which the sale was actually made, as bearing upon the question as to who was the procuring cause of the sale. However, the facts concerning Mr. Place's connection with the matter were afterwards quite fully testified to by *Mr. Koeffler*. He testified in effect that he first talked with Mr. Place about the property about the 6th of October; that the price of $8,000 was definitely fixed when

Mr. Place saw him on the 8th of October; that on the 9th or 10th of October Mr. Place told him that Mr. Kootz was the man who was going to buy the property, and requested that he make a thirty-day option to Kootz; that Place gave him a check for $300 to pay on the option; that he then executed the option and dated it October 11th at Mr. Place's request; and that the deed was made November 10th to Mr. Kootz. He also admitted that, when he talked with *Grieb* in June, *Grieb* told him that he proposed to offer the property to Mr. Kootz. Thus the erroneous ruling seems to have been practically reversed, the circumstances under which the option was made to Mr. Kootz were practically stated, and no suggestion was made that there were any further relevant facts. Such being the situation, we hold that the error in the original ruling was cured.

It is claimed that the evidence showed that the value of the property had so materially increased between the first interview with the plaintiffs and the time of the sale that it was the duty of the court as matter of law to hold that the plaintiffs' agency contract was at an end before the sale to Kootz was made, under the ruling in *Wasweyler v. Martin,* 78 Wis. 59, 46 N. W. 890. While there was some rather shadowy evidence of increase in value there was also evidence to the contrary, and the court would not have been justified in making any such ruling. Furthermore, it appeared without dispute that the defendants knew when they made the option that Mr. Kootz was the man whom the plaintiffs proposed to secure as a purchaser, and the jury found affirmatively that the defendants were not justified in assuming that the plaintiffs had abandoned the attempt to find a purchaser. Under these circumstances, the principle of the *Wasweyler Case* has little, if any, application.

By the Court.—Judgment affirmed.

STORK, Respondent, vs. CHARLES STOLPER COOPERAGE COMPANY, Appellant.

February 3—February 21, 1906.

Master and servant: Personal injuries: Evidence: Special verdict: Material questions: Negligence: Simple tools; Monkey wrench: Uncovered gearing: Instructions to jury: Proximate cause.

1. In an action for personal injuries received by a servant from machinery, while on many questions there was substantial conflict, and what might be deemed a preponderance of the evidence against the verdict, it is *held* that there was credible evidence from which the jury might have reached their conclusions expressed in the special verdict.
2. Where the jury in the special verdict have found that the defendant had actual knowledge of the defects which were claimed to have caused personal injuries to a servant, a question of said verdict: "Ought the defendant by the exercise of ordinary care to have known that the wrench was defective before plaintiff was injured," is immaterial.
3. Generally speaking, in case of simple tools no liability rests on the master for the ordinary perils resulting from their use, nor for those latent and usual defects or weaknesses which, by reason of the common, usual character of the appliance, are presumed to be known to all men alike, but such exemption is based on the condition that the defect and peril are such that no superiority of knowledge of the master over the employee exists or can be presumed.
4. As to simple tools and appliances the exemption of the master from the duty to inspect to ascertain the development of defects and disrepair in the course of their use is based upon the assumption that such conditions are as much within the observation, if not more so, of the employee as of the master.
5. Such exemptions from liability are not in denial of the general underlying principle of the law of negligence that one who knowingly exposes another to likelihood of injury is liable therefor, in the absence of consent by such other or of contributory negligence.
6. In an action for personal injuries to a servant it appeared, among other things, that plaintiff was injured while using a monkey wrench; that the screw intended to move and hold the jaws of this wrench was so defective that it would not accomplish the latter purpose under pressure; that such fact was brought to

the actual notice of defendant's representative a week or ten days before the accident; that the defect was not such as to be obvious to one attempting to use the wrench, and that the wrench was expected to be used, as it was, in tightening or loosening nuts upon running machinery with exposed gears. *Held*, that the jury might have considered it within the realm of ordinary expectation that, when so used, the jaws of the wrench would be likely to part, allow the wrench to slip, and the hand of plaintiff come in contact with the gearing to his hurt, and hence it cannot be said, as a matter of law, that there was no evidence to support liability for the injury so occurring.

7. In an action for personal injuries to a servant it appeared, among other things, that the injury resulted from contact with uncovered gearing, the presence of which was not only unlawful under sec. 1636*j*, Stats. 1898, and therefore negligent, but might also have been considered negligence on the part of the defendant independently of such statute. The court failed to submit to the jury as part of the special verdict a question as to whether the defects complained of and absence of warning to the plaintiff were the proximate cause, but did submit a question as to whether there was any want of ordinary care on the part of defendant which proximately caused plaintiff's injury, which the jury answered "Yes." There was no instruction that they could so answer only in case they found the defect to have been the natural and probable cause of the injury, but, on the contrary, they were instructed to answer affirmatively in case they so found, and, by separate and independent paragraph, also to answer "Yes" if they found there was any negligence on defendant's part which was the natural and probable cause. It was conceded that plaintiff had full knowledge of the exposure of the gearing. *Held*, that the jury might have believed that the exposed gearing was an act of negligence on the part of the defendant, and that it was the proximate cause within the definition given by the court.

8. In such case the actual causal relation between the defect in the wrench and the injury cannot be said to exist as matter of law, although it might be found as a fact that one supplying such a defective wrench should, as an ordinarily prudent and intelligent man, anticipate the likelihood that it would be used in such way as to cause injury.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

On January 25, 1900, the plaintiff was employed in defendant's cooperage factory upon a certain machine. He was then nineteen years of age, considerably experienced with machinery, and had worked about six months in defendant's factory, and on numerous occasions with the machine in question. A transverse shaft ran across the machine, having at one end an exposed gearing, and, about four inches from the gearing, passed through a box or journal, the top of which was fastened down with bolts each having a nut on top. It often became necessary, by reason of the heating of this box, to loosen such nuts, and plaintiff had done so a great many times, picking up for that purpose any one of several monkey wrenches which were about the shop, but none of which was specially supplied for that purpose. On the day in question this operation became necessary, and plaintiff went to a machine a few feet away and found a monkey wrench which, without looking at it to ascertain its condition, he fitted to the nut and pushed on the handle away from himself and toward the gearing. The wrench was claimed to be defective so that the jaws parted and it slipped off the bolt suddenly, and plaintiff's hand went into the gearing and was seriously mangled. There was some evidence from another employee that he saw the wrench used by the plaintiff; that he was familiar with it and had discovered a few minutes before that the thread of the screw which moved and held the jaws was so worn out that the jaws would part upon application of pressure; that about a week before he had discovered the existence of that defect in a less degree, and had called to it the attention of the foreman whose business it was generally to look after and repair all machinery and appliances in the shop. The jury, by special verdict, found: (1) That the wrench was defective. (2) That defendant's foreman had been notified thereof before the day of the accident. (3) That defendant ought, by the exercise of ordinary care, to have known of the defect. (4) That the plaintiff neither knew, nor by

the exercise of ordinary care ought to have known, thereof. (5) "Was there any want of ordinary care on the part of the defendant which was the proximate cause of the plaintiff's injury?" *Answer.* "Yes." (6) There was no want of ordinary care on the part of plaintiff which proximately contributed to the injury. And (7) damages. Defendant having previously moved for nonsuit and for direction of a verdict, after verdict moved to reverse the answers to questions 1, 2, 3, 4, 5, and 6, and for judgment in favor of the defendant; or, in the alternative, that the verdict be set aside and a new trial granted, which motions were overruled and judgment entered in favor of the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *Vilas, Vilas & Freeman,* and oral argument by *E. P. Vilas.*

For the respondent there was a brief by *Fiebing & Killilea,* attorneys, and *C. H. Van Alstine,* of counsel, and oral argument by *Mr. H. J. Killilea* and *Mr. Van Alstine.*

DODGE, J. 1. The first assignment of error involves, primarily, the assertion that there was no credible evidence upon which the jury might have reached their conclusions expressed in the special verdict. With this we cannot agree. While on many of these questions there was substantial conflict and, perhaps, what we might deem a preponderance of evidence to the contrary, there was at least some evidence in support of each of the answers, except perhaps the third, which, however, is immaterial in presence of the finding of defendant's actual knowledge of the defect in the wrench.

2. It is strenuously urged that a monkey wrench falls within the category of common and simple tools, as to which, it is asserted by the appellant, the master is not bound by the ordinary rule that he must supply his employee with suitable and safe appliances. It may be conceded that, generally speaking, a monkey wrench is in such category, and the rule

of law is well established in this state and elsewhere that in case of such simple tools no liability rests on the master for the ordinary perils resulting from their use, nor for those latent and usual defects or weaknesses which, by reason of the common, usual character of the appliance, are presumed to be known to all men alike. This exemption from liability is, we believe, in all cases based upon the condition that the defect and peril are such that no superiority of knowledge in the master over the employee exists or can be presumed. *Corcoran v. Milwaukee G. L. Co.* 81 Wis. 191, 51 N. W. 328; *Borden v. Daisy R. M. Co.* 98 Wis. 407, 74 N. W. 91; *Olson v. Doherty L. Co.* 102 Wis. 264, 271, 78 N. W. 572; *Marsh v. Chickering,* 101 N. Y. 396, 5 N. E. 56; *Cahill v. Hilton,* 106 N. Y. 512, 518, 13 N. E. 339; *Garnett v. Phœnix B. Co.* 98 Fed. 192; *Louisville, E. & St. L. C. R. Co. v. Allen,* 47 Ill. App. 465; *Georgia R. & B. Co. v. Nelms,* 83 Ga. 70, 9 S. E. 1049. Another qualification of the master's liability indulged in case of such simple tools and appliances is exemption from a duty to inspect to ascertain the development of defects or disrepair in the course of their use, based also upon the assumption that such conditions are as much within the observation of the employees as of the master, if not more so. *Twombly v. Consolidated E. L. Co.* 98 Me. 353, 57 Atl. 85; *Wachsmuth v. Shaw E. C. Co.* 118 Mich. 275, 76 N. W. 497; *Cregan v. Marston,* 126 N. Y. 568, 27 N. E. 952; *Relyea v. Tomahawk P. & P. Co.* 110 Wis. 307, 85 N. W. 960. While these rules result practically in a relaxation of the master's duty and liability in the case of such simple tools, they are not at all in denial of the general underlying principle of the law of negligence that one who knowingly exposes another to a likelihood of injury is liable therefor, in the absence of consent by such other or of contributory negligence. As stated above, the relaxation of the master's duty and liability rests on the assumed equality of knowledge and ability to discover the defect complained of. It can have no application to a defect of which the master is

actually cognizant, and which, as a reasonable man, he should appreciate is likely to result in injury to one using the implement as it is likely to be used, and which is neither known to the employee nor of such a character as to be obvious to that observation which may be expected to accompany its use. In such case the general rule of negligence as above stated is fully effective, and the master who knowingly and negligently exposes his employee to a peril unknown to the latter must respond for the damage which results. *Vant Hul v. Great Northern R. Co.* 90 Minn. 329, 96 N. W. 789; *Johnson v. Mo. Pac. R. Co.* 96 Mo. 340, 9 S. W. 790; *Chicago, K. & W. R. Co. v. Blevins,* 46 Kan. 370, 26 Pac. 687; *Twombly v. Consolidated E. L. Co., supra.* In the case before us there was at least some evidence that the screw intended to move and hold the jaws of this wrench was so defective that it would not accomplish the latter purpose under pressure; that such fact was brought to the actual notice of the defendant's representative a week or ten days before; that it was not such as to be obvious to one attempting to use the wrench; that the wrench was expected to be used, as in this particular case, in tightening or loosening nuts upon running machinery with exposed gears, from all of which the jury might have considered it within the realm of ordinary expectation that, when so used, the jaws would be likely to part, allow the wrench to slip, and the hand of the operator to come in contact with moving parts of the machinery to his hurt. Hence we cannot say that as a matter of law there was no evidence to support liability for an injury so occurring.

3. The chief difficulty arises upon the appellant's contention that there is no finding that the defect in the wrench was the proximate cause of the plaintiff's injury. It should be remembered that the injury resulted directly from contact with an uncovered gearing, the presence of which was not only unlawful under sec. 1636*j*, Stats. 1898, and therefore negligent, but might also have been considered negligence on the part of

the defendant independently of such statute. In this situation the court submitted to the jury no question as to whether the defects in the wrench and absence of warning to the plaintiff were the proximate cause, but whether there was "any want of ordinary care on the part of the defendant which proximately caused the plaintiff's injury." This the jury answered "Yes." There was no instruction that they could so answer only in case they found the defect in the wrench to have been the natural and probable cause of the injury, but, on the contrary, they were instructed to answer affirmatively in case they so found, and, by separate and independent paragraph, also to answer "Yes" if they found there was any negligence on defendant's part which was the natural and probable cause. We think the conclusion irresistible that the jury might well have believed that the exposed gearing was an act of negligence on the part of defendant, and that it was the proximate cause within the definition given by the court. If so, concededly the defendant would not be liable, for the plaintiff had full knowledge of the exposure of this gearing, and had, doubtless, assumed any risk therefrom.

It is suggested that proximate causation of the injury by the defect in the wrench is so obvious that the court must declare it as matter of law. The legal proximate relation between cause and result involves so much of inference from the known characteristics of human nature, in deciding what is or should be within the reasonable anticipation of the ordinarily prudent and intelligent person under all the circumstances, that very rarely can that relationship be declared, at least in the affirmative, as matter of law. Doubtless there may be such cases, as where a railroad train breaks through a known defective bridge, or a pedestrian on a sidewalk steps into an obviously dangerous hole, or a surgical operation is negligently performed. *Allen v. Voje,* 114 Wis. 1, 17, 89 N. W. 924. In this case, however, while the actual causal relation is perhaps undisputed, we think it cannot be said as mat-

ter of law, although it might well be found as a fact, that one supplying such a defective wrench should, as an ordinarily prudent and intelligent man, anticipate the likelihood that it would be used in such a way as to cause injury. We are persuaded that was the question for the jury and has not been passed upon by this verdict, which therefore does not support the judgment for the plaintiff.

By the Court.—Judgment reversed, and cause remanded for new trial.

SCHULTZ, Appellant, vs. STRAUSS, Respondent.

February 5—February 23, 1906.

Slander: Statements made before grand jury and to district attorney: Judicial proceedings: Privileged communications: Privileged occasions: Cause of action: Discovery.

1. No cause of action for slander lies for statements and communications made to a grand jury in the course of their proceedings or to the district attorney and his assistants in their official capacities.
2. Words spoken in judicial proceedings, though they are such as impute a crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry.
3. Exemption from liability for words spoken on a privileged occasion is not the same privilege recognized in the law as pertaining to confidential communications, but they are privileged upon the ground that they furnish no ground of action for the alleged injury.
4. Proceedings of a grand jury are judicial proceedings.
5. In an action for slander for statements made to the grand jury in the course of their proceedings and to the district attorney in his official capacity, the very nature of the complaint shows that the statements made were pertinent and material to the subject under consideration by the grand jury, and that they were communicated to the grand jury in a judicial proceeding.

6. Such communications are made on a "privileged occasion," and are therefore not actionable.
7. Where plaintiff has no cause of action for slander because the words spoken were communicated to the grand jury in the course of their proceedings, or to the district attorney in his official capacity, it is not error for the circuit court to restrain a court commissioner from punishing for contempt a defendant who refused to answer questions propounded to him touching such communications while being examined as an adverse party under sec. 4096, Stats. 1898.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Plaintiff was indicted by the grand jury and was charged with extortion and bribery. He alleges that the charges are entirely false and unfounded in fact, and avers that the evidence upon which the district attorney and the grand jury acted was presented to them by the defendant and that his statements are false and defamatory. He also claims that, by reason of the false and defamatory language spoken of him by the defendant to the grand jury and the district attorney, he has been much defamed and damaged in his character. This action is founded on the claims of plaintiff as above set forth. Plaintiff made an affidavit setting forth that he had no personal knowledge of the words spoken by the defendant and that he had been unable to discover particulars concerning them, and he demanded an examination of the defendant under sec. 4096, Stats. 1898, to enable him to frame his complaint, and for this purpose he instituted a discovery proceeding before a court commissioner of the Milwaukee county circuit court. The points upon which discovery is sought, as alleged in plaintiff's affidavit, are to ascertain the exact language used by defendant in speaking of and concerning plaintiff, the time, the occasion, and the persons present; whether the statements were true or false and whether prompted by motives of express malice; and by whom the matters covered by the alleged defamation were brought to the attention of the grand jury. Upon this examination the defendant, under ad-

vice of counsel, refused to answer certain questions propounded to him, upon the ground that the communications and statements sought to be elicited by these inquiries were made to and in the presence of the members of the grand jury for the June, 1905, term of the municipal court of Milwaukee county, and while they were in session, and also to Francis E. McGovern in his official capacity, then the district attorney of Milwaukee county, and that the information sought had relation to matters then pending for investigation by the grand jury and the district attorney. Upon application to the court for a review of the court commissioner's proceedings and for directions as to further proceedings before him, the court ruled and ordered that "all orders and directions made by the court commissioner upon the examination of the defendant in this cause, whereby defendant was ordered and directed to answer certain questions tending to disclose communications made by the defendant to the grand jury of Milwaukee county while in lawful session and to the district attorney of Milwaukee county in his official capacity, be and the same are hereby reversed, vacated, and set aside, and the defendant is by this order purged of any alleged contempt by reason of his failure to comply with orders and directions of the court commissioner in reference to making answer to said questions." The court further directed that he be not required to answer the questions theretofore propounded upon such examination tending to disclose any statement or communication he had made to the grand jury in the conduct of their proceedings, or to the district attorney and his assistants in their official capacities. This is an appeal from such order of the court.

Fred'k W. von Cotzhausen, counsel for appellant.

For the respondent there was a brief by *Hoyt, Doe, Umbreit & Olwell,* and oral argument by *A. C. Umbreit.*

SIEBECKER, J. It is contended that the order appealed from should be reversed because the subject concerning which

the court forbids inquiry to be made is not within the field of privilege. Plaintiff instituted this action to recover damages, upon the ground that he has been seriously defamed in his character and standing, and that the law awards a right to recover compensation for the injury. The order appealed from is specific in forbidding any disclosure of statements and communications made by the defendant to the grand jury in the course of their proceedings or to the district attorney and his assistants in their official capacities. Appellant's counsel frankly admits this to be the effect of the order but challenges its validity, and asserts that statements and communications so made to a district attorney or a grand jury are not privileged upon the grounds claimed, namely, that the statements and communications were made in the course of judicial procedure or that the secrecy respecting grand jury proceedings (as to such statements and communications) must be maintained. The statute providing discovery in proceedings as instituted by plaintiff is framed upon the idea that a plaintiff requires the aid of this remedy to enable him to frame his complaint for the cause of action arising out of the transactions concerning which he seeks discovery. It is therefore essential to inquire at the very threshold of the case: Has plaintiff any right in the law to recover compensation, as for a defamation, on account of any statement or communication the defendant may have made to the grand jury or the district attorney in his official capacity? It is well recognized by numerous adjudications "that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry." *Hoar v. Wood,* 3 Met. 193. From an early time this rule has had support and it has been adhered to in the decisions of this court, as is evidenced by the following cases: *Jennings v. Paine,* 4 Wis. 358; *Calkins v. Sumner,* 13 Wis. 193; *Larkin*

v. Noonan, 19 Wis. 82. This appears to be the accepted doctrine of the common law in this country, and it is well entrenched by the decisions of many courts, among which are the following: *Acre v. Starkweather,* 118 Mich. 214, 76 N. W. 379; *Hart v. Baxter,* 47 Mich. 198, 10 N. W. 198; *McDavitt v. Boyer,* 169 Ill. 475, 48 N. E. 317; *Blakeslee v. Carroll,* 64 Conn. 223, 29 Atl. 473; *Lauder v. Jones,* 13 N. Dak. 525, 101 N. W. 907; *Kidder v. Parkhurst,* 3 Allen, 393; *Rice v. Coolidge,* 121 Mass. 393; *Mower v. Watson,* 11 Vt. 536.

The exemption from liability for words spoken on a privileged occasion is not the same privilege recognized in the law as pertaining to confidential communications, as between attorney and client and other like confidential relations, but they are privileged upon the ground that they furnish no ground of action for the alleged injury. The inquiry then is: Were the words complained of spoken in the course of judicial proceedings and were they pertinent and related to the subject of inquiry? The proceedings of a grand jury are unquestionably judicial in character (*Counselman v. Hitchcock,* 142 U. S. 547, 12 Sup. Ct. 195), and were expressly so declared by this court in *Larkin v. Noonan,* 19 Wis. 82, where the court quotes approvingly the language used in the case of *Thorn v. Blanchard,* 5 Johns. 508, to the effect that in certain classes of cases no prosecution for defamation will lie for statements and communications made in the presence of a grand jury and in proceedings in the regular course of justice, upon the ground that "the policy of the law here steps in and controls the individual rights of redress. The freedom of inquiry, the right of exposing malversation in public men and public institutions to the proper authority, the importance of punishing offenses, and the danger of silencing inquiry and of affording impunity to guilt, have all combined to shut the door against prosecutions for libels in cases of that or of analogous nature." The case of *Calkins v. Sumner,* 13 Wis.

193, is not in conflict with this decision. The court states in its opinion, commenting on the erroneous rule submitted by the lower court to the jury:

"The rule is, that if what is said or written be pertinent and material to the cause or subject matter of inquiry, the speaker or writer is not liable to an action, however much he may be actuated by hatred or ill-will."

Whatever defendant may have stated to the grand jury or the district attorney must be held pertinent and material from the very nature of the complaint now made against defendant for damages. It is not disputed but that the injury complained of arises out of the transaction resulting in the indictment by the grand jury, which it is charged that the defendant falsely and maliciously instigated. From this it must follow that the alleged defamatory matter was applicable and pertinent to the subject under consideration by the grand jury, and that it was communicated to them in the course of a judicial proceeding. The order appealed from forbids disclosure of statements and communications so made to the grand jury and to the district attorney who were investigating this subject, and these statements and communications must be held to have been made on an "occasion of privilege," and to be therefore not actionable in the law.

This right of exemption from liability for defamatory words spoken under such circumstances has been regarded as of such importance in the administration of public affairs, for reasons of public safety and for the security of the individual from harassing and unjust prosecutions, that the people of the various states have guarded it by constitutional provisions protecting the liberty of speech. It is embodied in sec. 3, art. I, of the state constitution. Mr. Cooley, commenting on these provisions in his Constitutional Limitations, states:

"It is to be observed of these several provisions that they recognize certain rights as now existing, and seek to protect and perpetuate them by declaring that they shall not be

abridged, or that they shall remain inviolate. They do not assume to create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed. We are at once, therefore, turned back from these provisions to pre-existing law, in order to ascertain what the rights are which are thus protected, and what is the extent of the privileges they undertake to assure." Cooley, Const. Lim. (7th ed.) 596 *et seq.*

Among the rights so protected by the constitutional provisions he enumerates and discusses the privileges accorded to statements made by witnesses and counsel in the course of judicial proceedings for bringing offenders to justice, and the furnishing of preliminary information to officers charged with the duty of enforcing the law against offenders, and these are held to come within the rule of privileged occasions. Id. 629 *et seq.* Statements made to police and prosecuting officers with the design of originating and forwarding such proceedings are declared by the adjudications to be within the rule. *Grimes v. Coyle,* 6 B. Mon. 301; *In re Quarles and Butler,* 158 U. S. 532, 15 Sup. Ct. 959; *Shinglemeyer v. Wright,* 124 Mich. 230, 82 N. W. 887; *Morrow v. Wheeler & W. Mfg. Co.* 165 Mass. 349, 43 N. E. 105; *Wright v. Lothrop,* 149 Mass. 385, 21 N. E. 963; *Gabriel v. McMullin,* 127 Iowa, 426, 103 N. W. 355; *Vogel v. Gruaz,* 110 U. S. 311, 4 Sup. Ct. 12. Applying these principles to the facts and circumstances alleged for the purpose of obtaining discovery in the instant case, it necessarily follows that plaintiff has no cause of action arising out of the transaction participated in by the defendant before the grand jury; nor has he a cause of action against defendant by reason of any statements defendant made to the district attorney or his assistants in their official capacities. The order appealed from properly prohibited the court commissioner from inflicting the threatened punishment as for a contempt, and justly restrained him from causing disclosure in the course of the discovery proceedings of the transactions involved in the inquiries propounded to defendant.

It is urged that the doctrine of the decisions in the cases of *Murphy v. State,* 124 Wis. 635, 102 N. W. 1087, and *Havenor v. State,* 125 Wis. 444, 104 N. W. 116, recently made by this court, is a modification, by a partial abrogation, of the common-law rule pertaining to the secrecy of grand jury proceedings, and that such modification permits disclosure of such proceedings for the purposes now demanded. We find no basis for this claim and must re-affirm what was stated in the *Havenor Case,* that the secrecy of grand jury proceedings must be maintained within the limits prescribed by the statutes and established by the decisions of the courts, for reasons of public policy, to promote the effectual enforcement of the criminal law. This question is not, however, of importance in this case in view of the considerations above stated, which here control.

By the Court.—Order affirmed.

CHYBOWSKI, Respondent, vs. BUCYRUS COMPANY, Appellant.

February 5—February 23, 1906.

Trial: Impaneling of jury: Interrogation of opposing counsel: Court and jury: Master and servant: Personal injuries: Defective machinery: Evidence: Burden of proof.

1. On the trial of an action for personal injuries to a servant, plaintiff is not entitled to interrogate defendant's counsel, either at the bar or on the stand as a witness, as to whether an insurance company is pecuniarily interested in the litigation.
2. When the evidence in relation to a controverted question of fact on the one side accords with what must necessarily have been the case under given undisputed and indispensable circumstances, and the evidence on the other side is opposed thereto, there is no room for conflicting reasonable inferences, and hence no question for solution by a jury.
3. Whether such situation does or does not exist in any case is a matter for the court to determine, and it should do so even

without a motion in that regard. Refusal so to do, in the face of a proper motion, is no less than the denial of a right.

4. In an action for personal injuries alleged to have been caused by the improper working of a steam hammer, the construction of the machine is *held* to present such positive demonstration of impossibility of the accident complained of that the contrary evidence of the operatives of the machine did not raise any conflict for solution by the jury.

5. In an action for personal injuries to a servant from an alleged defective machine, satisfactory proof that the machine worked perfectly both before and after the accident casts the burden on plaintiff to show that its alleged defective action was caused by a defect in the machine.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Reversed.*

Action to recover for personal injuries. Plaintiff complained that while in the employ of defendant the latter failed to furnish him a reasonably safe place in which to do his work, in that his working place was in close proximity to a steam hammer so defective that it was liable to deliver two blows when only one was intended and without any manipulation of the controlling levers for the second strike and thereby cause the drift pin, used on the occasion in question, if moved out of its place or turned over by the first blow, to fly from its location under the hammer with great force, and to injure any person who might be within its range; that plaintiff was injured in that way, his right leg being fractured above the knee. Judgment was asked in the sum of $10,000. Defendant answered putting in issue all allegations in respect to the hammer being defective.

During the impaneling of the jury plaintiff asked defendant's counsel if a certain insurance company was not pecuniarily interested in the litigation. The latter objected to being so interrogated in the presence of the jury, and still further objected to being interrogated at all in his place as defendant's representative, and compelled to answer the questions. He was then called to the stand as a witness and sworn. The

question was then repeated to him and, under protest, by order of the court he was compelled to answer, which he did in the affirmative.

The mechanism which it was claimed caused the injury consisted of a hammer weighing about 1,250 pounds, a piston rod, piston head, and cylinder set in a vertical position with such connections that by a proper manipulation thereof the hammer could be caused to drop, striking whatever was on the hammer bed with its own weight accelerated by a steam pressure of from seventy to ninety pounds to the square inch and to rise *again to its position* and repeat the blow as often as desired, but only by manipulation of the operating lever. There were two levers. One was to control the steam as to turning it on or off from the boiler, and the other to control the application of the steam as to applying it below the piston head to raise the hammer, exhaust it to permit the hammer to fall, and to apply it above the cylinder head to add the force thereof to the gravity power of the falling weight.

There was no way by which the hammer could be raised to deliver a blow, except by drawing the steam lever and raising the operating lever. There was no way by which a blow could be delivered except by putting down the operating lever. If a blow was desired combining the falling weight of the hammer and the steam pressure also, that was accomplished by pressing down the operating lever while the steam was on. If a blow was only desired of the falling weight of the hammer, that was accomplished by shutting off the steam and putting the operating lever down. There was no automatic shutting off or on of the steam, or turning in of the steam above or below the piston head. Every movement of the hammer was positive following the appropriate movements of the operating lever and steam lever.

The evidence, in the main, was directed to the point of whether on the occasion in question the hammer struck two

blows when only one was desired, or in other words, whether, the appliance being manipulated to strike one blow, two blows were delivered without any movement of the levers. There was evidence for the plaintiff by the boy who operated the levers on the occasion in question, and who had operated them for weeks prior thereto, that the hammer was accustomed to strike two blows when only one was desired, and to deliver the second blow without any change in the controlling lever; that he made complaint on several occasions to the boss of the department, who promised to fix the machine. He testified that if the levers did their work properly the machine could not work that way. He attributed the second blow of the hammer to some defect in the machine, but suggested no particular defect, and suggested no cause whatever except a leak of steam. There was other testimony on the part of plaintiff to the effect that a second blow might be caused when only one was desired by water in the cylinder, or by a leak of steam around the piston head where it entered the cylinder. The evidence on the part of defendant was to this effect: The hammer worked perfectly prior to the occurrence in question and thereafter. It was an utter impossibility for such a hammer to rebound after striking a blow and strike a second blow as testified to by plaintiff's witness; that such a movement would render the hammer worse than useless. The hammer could only be raised by turning on the steam and raising the operating lever letting steam in below the piston head. So long as the operating lever remained up and the steam on, it was an utter impossibility for the hammer to fall because the full pressure of the steam in the boiler would extend to the cylinder head. The cylinder head could not descend, allowing the hammer to drop, without compression of the steam and back pressure on the boiler, which was an impossibility, the pressure customarily being seventy to ninety pounds to the square inch. The hammer after being raised by the steam pressure could not be made to fall otherwise than by shutting off the

steam and dropping the operating lever. No movement of the hammer was possible except in response to proper movements of the levers mentioned, the one designed to turn on and off the steam and the other to apply it.

At the close of the evidence defendant's counsel moved the court to direct a verdict in favor of defendant. The motion was denied. The jury rendered a special verdict, finding, in effect, as follows: The steam hammer was out of repair, causing it to strike two blows when only one was desired, notwithstanding proper manipulation of the controlling levers by the hammer-boy. That defective condition of the hammer was the proximate cause of plaintiff's injury. The defendant, by the exercise of ordinary care, might have known of such defective condition of the hammer for a sufficient length of time before the accident to have remedied the same. The plaintiff was not guilty of any want of ordinary care contributing to the injury. Three thousand dollars will be required to compensate him for his injury.

After verdict defendant's counsel moved the court to change the finding in respect to the hammer being defective and striking two blows when only one was desired, so as to negative any such condition, and by striking out the finding in respect to the hammer being defective, as claimed by plaintiff, and the defects having existed so long that defendant, by the exercise of ordinary care, might have discovered them a sufficient length of time before the accident to have remedied the same, and to give judgment in its favor of no cause of action. The motion was denied. The court then, on motion, rendered judgment in favor of plaintiff for the amount of damages found by the jury.

For the appellant there was a brief by *Hoyt, Doe, Umbreit & Olwell,* and oral argument by *J. B. Doe.*

For the respondent the cause was submitted on the brief of *K. Shawvan,* attorney, and *Ryan, Ogden & Bottum,* of counsel.

MARSHALL, J. In *Faber v. C. Reiss C. Co.* 124 Wis. 554, 102 N. W. 1049, it was held that a juror may properly be interrogated upon the *voir dire* as to whether he is in the employ of or in any way concerned with any insurance company which is pecuniarily interested in the litigation, the examination being conducted in the presence of jurors already in the box and those not yet drawn, if thought best, and in such reasonable manner as not to place improper matters before them or suggest impropriety in the company's connection with the case. In other words, such examination is proper so long as conducted "strictly within the right" to discover the state of mind of the juror as regards the matter in hand or any collateral matter reasonably liable to unduly influence him. The learned circuit court seems to have considered the conclusion in that case with what was said in support thereof as warranting the extraordinary proceeding detailed in the record. If there is anything in the former case suggesting the propriety of requiring counsel to state either from his place as such or from the stand as a witness, as was done here, whether an insurance company is concerned in the litigation, we are not conscious of it. It would seem that the words in the former case to the effect that the questions propounded must be to the juror and "strictly within the right" as to his status respecting the controversy in hand, by necessary implication, condemn the proceeding under consideration.

The mere fact that an insurance company was concerned in the litigation was wholly immaterial. The attitude of the court as to compelling appellant's counsel to bear evidence in respect thereto, notwithstanding assurance of respondent's counsel that the information sought for was wanted only as a basis for interrogating the juror, clearly gave undue importance to the insurance company's connection with the case since no such basis was necessary. It was a matter quite likely to prejudice the jury and should not have been adverted to at all except by questions to the particular juror under examina-

tion and "strictly within the right" to discover whether any bias or basis therefor on his part existed. The pretense that it was necessary to interrogate counsel, as was done, to obtain a basis for such discovery should not have appealed successfully to the court.

All cases, but particularly such as the one in hand, should be managed from the bench with the most scrupulous and constant regard for the existence of those mere ulterior matters liable to be referred to purposely or apparently so, in a way to improperly influence the jury. That is due to the parties, and is due as well to the jurors themselves. They have the single function to perform of determining the truth as to controverted issues of fact solely from the competent evidence produced in their hearing and the law as given to them by the court. When their true position, and that only, is kept before them from the beginning to the end of the trial, and they are inspired by the guiding hand of the judge to win distinction by putting aside every influence except the evidence and the law proper for their consideration, the jury system is commonly vindicated as being the best that has been designed or is designable for the discovery of truth in the administration of justice. The proceeding under consideration was a wide departure from that standard. It was wholly unnecessary to the ostensible purpose thereof. The effort to interrogate counsel, at the very outset should have been firmly repressed and the attention of the interrogator directed to the only legitimate subject in hand: that of determining whether the juror was in any wise concerned in any insurance company interested in the litigation. The discovery in that regard might well have been obtained by one or two proper questions not calculated to unduly suggest the fact of the company's connection with the case.

In addition to the foregoing the proper solution of the question as to whether the evidence warranted the finding that the steam hammer was defective and thereby it was caused to

make two strokes when only one was intended, producing the injury complained of, so effectually disposes of this appeal, and under the present practice, in view of the record, of the litigation as well, that it does not seem advisable to discuss any other matter. We will consider such additional matter briefly.

Nature's unchanging and unchangeable laws and the unvarying and invariable principles of mechanics cannot be turned aside by the verdict of a jury, even if the matter concerning the same is given into their hands accompanied by a judicial suggestion that there may be reasonable doubt in respect thereto. This court has often spoken decisively on that subject for the guidance of trial courts, as well as for the purposes of the particular cases in which the matter was involved. *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434; *Montanye v. Northern Elec. Mfg. Co., ante,* p. 22, 105 N. W. 1043.

When the evidence in relation to a controverted question of fact on the one side accords with what must necessarily have been the case under given undisputed and indisputable circumstances, and the evidence on the other side is opposed thereto, obviously there is no room for conflicting reasonable inferences, consequently no question for solution by a jury. Whether such situation does or does not exist in any case is a matter for the court to determine. It cannot escape the responsibility of solving it and doing so considerately. Such a situation often presents the most severe test of judicial courage which trial courts are subjected to. Failure to satisfy such test in all respects gives ground, unjustly it seems, for much of the criticism often heard of the jury system. The duty devolves upon the presiding judge, in every jury trial, before giving the controversy over to the jury for a determination, of deciding whether, under the evidence and the law applicable thereto, there can fairly be said to be reasonable inferences favoring one side as well as such inferences favoring

the other, so that the truth of the matter may be with the former or with the latter. It is easy to see that in case of a decision in the affirmative, when the conclusion clearly should be in the negative, the jury must naturally regard such decision as suggesting that their function as to determining a conflict between reasonable inferences is necessarily called into action. They take the case, in such circumstances, at the hands of the court accompanied by a decision, in advance by paramount authority, that the evidence, in view of the law applicable thereto, will sustain a verdict either way, according as the same may be viewed by them. Upon their going wrong, harsh criticism thereof and of the jury system itself, is quite out of place. The fault is not with the system, but with its administration. *Musbach v. Wisconsin C. Co.* 108 Wis. 57, 69, 84 N. W. 36.

Where the evidence is sufficient only to give rise to mere conjecture in favor of the plaintiff, or to suggest merely a possibility of the truth being as claimed by him—*Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Sorenson v. Menasha P. & P. Co.* 56 Wis. 338, 14 N. W. 446; *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217, 225, 80 N. W. 1020; *Spencer v. C., M. & St. P. R. Co.* 105 Wis. 311, 81 N. W. 407; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 345, 85 N. W. 1036—or the evidence in his favor is contrary to all reasonable probabilities, the jury are placed in a false position by being directed to determine upon which side are the major and controlling probabilities. The court in such circumstances, without a motion in that regard, should apply the law thereto and dispose of the litigation accordingly. Refusal in that regard, in face of a proper motion invoking judicial action, is no less than the denial of a right. *Finkelston v. C., M. & St. P. R. Co.* 94 Wis. 270, 68 N. W. 1005; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 330, 80 N. W. 644; *Optenberg v. Skelton,* 109 Wis. 241, 85 N. W. 356. We

are not unmindful that error now and then in respect to such matters is consistent with the most careful judicial administration. What has been said has reference particularly to those extreme cases, of which this is one, which are too plain to admit of any reasonable controversy.

It requires but the most ordinary appreciation of the operation of a machine,—combining a block of steel, weighing 1,250 pounds, more or less, for use as a hammer, suspended above an anvil bed by a piston rod having its upper end armed with a piston head inclosed in a cylinder in the ordinary way for utilizing the power of steam under compression, the whole appliance being erected in a vertical position with connections so as to permit of the piston head being made to oscillate, only by the necessary valves controlling the application of steam being operated by hand power as to each movement of the piston, as in this case; that is, such appliance not having any automatic device to cause the movement of the piston head in one direction to reverse the application of the steam pressure so as to produce a return motion—to perceive that a stroke of the hammer without the appropriate precedent movement of the controlling device is out of the question. It seems perfectly obvious that every movement of the piston head must necessarily be preceded by such appropriate shifting of the controlling device by the person in charge thereof. It follows that these must be regarded as verities respecting the case in hand: When the hammer-boy, as the one attending the machine was called, turned on the steam and raised the controlling lever so as to open the inlet below the piston head and the exhaust above, the hammer necessarily was elevated to a position of readiness for a strike. It could not go back against the steam pressure. It necessarily remained in the position of readiness for a strike, the steam pressure being continued, till the controlling lever was put down opening the exhaust below the cylinder head. After a blow was struck the hammer could not rebound against steam pressure ap-

plied above the piston head to accelerate the downward motion, in case of such acceleration. In case of the steam being cut off instantly upon the blow being delivered there could yet be no return motion to a position requisite for a second strike. The hammer would necessarily remain down by its own weight and by the steam pressure above the piston head as well till such pressure was reduced by condensation. The hammer could not go back for a second strike except in response to a reverse motion of the controlling device, opening the exhaust above the cylinder head and the inlet below. The testimony of a witness to the contrary of this only evidenced ignorance or something worse. Any amount of such contrary evidence could not raise any conflict for solution by a jury. Reasonable doubt respecting the truth of a matter arrived at by methods of positive demonstration cannot be created by any amount of mere speculation or conjecture, or even positive contrary evidence from the mouths of witnesses.

Proof that the machine worked perfectly both before and after the accident, which was very satisfactorily made, cast the burden on plaintiff to show that the alleged second strike of the hammer, if one occurred, was caused by a defect in the appliance. In this we put aside the evidence as to the double and uncontrollable action of the hammer as not worthy of belief. In any event it was efficiently rebutted, so far as such double motion of the hammer suggesting that it was the result of any defect in the machine. *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434. There was no attempt to lift the burden thus cast on respondent, except by proof that the alleged second motion of the hammer might have been caused by a leak of steam at the entrance of the piston rod into the cylinder or by water in the cylinder. There was no proof of a definite character that any such leak existed or that there was water in the cylinder. Moreover, it is readily seen that if there were such a leak it could not possibly have caused the alleged undesired motion of the hammer. The entrance

of the piston rod into the cylinder was below the piston head. Such a leak could not have been active except when the hammer was up and the steam pressure was on, and then the effect could only have been a mere waste of energy of a trifling character, necessarily supplied as fast as it occurred in case the steam was on, and otherwise it could only have permitted of a slow descent of the hammer as the steam escaped. In no event could it have caused the cylinder head to rise, lifting the hammer, or have caused any efficient motion of the hammer whatever. The suggestion of water in the cylinder is likewise hardly worthy of consideration. Water in the cylinder below the piston head, in case of any accumulation thereof at that point, would necessarily be forced out by the downward motion of the piston head. Water could have accumulated above the cylinder head only by condensation of the steam which caused the downward motion or a leaky valve, and such accumulation, if one occurred, could not in any event have caused a reverse motion or any motion of the hammer. Neither of the suggested explanations of the alleged double motion of the hammer was supported by anything better than baseless conjecture, as it seems to us. This is in accordance with the evidence and is self-evident.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to grant the motion made in appellant's behalf for a correction of the verdict, and for judgment in his favor dismissing the action with costs.

BINGHAM, Appellant, vs. BOARD OF SUPERVISORS OF MILWAUKEE COUNTY and others, Respondents.

February 5—February 23, 1906.

Constitutional law: Statutes: Special or private law: Classification by counties: Bonds: Tax levy: Requisites: Formalities: Collection: Treasurer's bond: Failure to file: Mandatory and directory provisions.

1. Under constitutional limitations classification must be based on substantial and real differences in the classes, which are germane to the purpose of the law and reasonably suggest the propriety of substantially different legislation, the legislation must apply to each member of the class, and the classification must not be based on existing circumstances only, but must be so framed as to include in the class additional members as fast as they acquire the characteristics of the class.
2. Ch. 444, Laws of 1903, entitled "An act to authorize the building and construction of viaducts across valleys, gullies, running streams, or railroad tracks by counties in this state of a population of 150,000 or more and for the issuing of county bonds therefor," is not a special or private law within the prohibition of sec. 31, art. IV, Const.
3. Under ch. 444, Laws of 1903, the classification of counties by population is not based on existing facts only, but is so framed as to admit additional members, is based on substantial and real differences germane to the subject covered by the law, and the characteristics of the class suggest the propriety of the law as applicable to the class, while refusing it to other counties not in the class.
4. In an action to restrain the issue of bonds of Milwaukee county, proposed to be negotiated under the provisions of ch. 444, Laws of 1903, it appeared, among other things, that in attempted compliance with sec. 3, art. XI, Const., and said statute, the county board, at the same time that it passed the resolution directing the issuance of the bonds, also passed a resolution providing that to meet the principal and interest thereof "there is hereby levied on all the taxable property of the county in each of the twenty years 1905 to 1924, inclusive, a tax" of one twentieth of the face of the bonds, and also in each of said years the amount of the necessary interest levy. *Held*, that the action taken was correct and the only action that would satisfy the constitutional and statutory requirements, and was not open to the objections that the board had no authority to levy a tax for any year

beyond the then current year, or that some taxes might become delinquent and not paid until after sale, and consequently the entire amount might not be on hand at the time the annual instalments fell due.

5. Ch. 444, Laws of 1903, provides that the county treasurer, before he shall receive the bonds issued under its authority or any money derived from the sale thereof, shall execute an additional bond in a specified sum within thirty days after it has been determined to issue such bonds. The county board by resolution of May 9th determined to issue such bonds, and on July 1st, following, the county treasurer filed his bond, which was approved August 8th, but was subsequently discovered to omit some conditions required by the statute, and in September following, and before receiving any bonds or money, he filed a new bond, containing all the necessary conditions, which was duly approved. *Held*, that the requirement of the statute as to the exact time when the bond should be filed was directory only, at least so long as it was filed before the treasurer's duties began, and that failure in this respect to strictly comply with the statute furnished no ground to enjoin the issue of the bonds.

6. Ch. 444, Laws of 1903, provides that bonds under the act shall be of three several denominations, "the number of bonds of such denominations to be fixed by the county board." *Held*, that such statute is mandatory to the extent that no bond can lawfully be issued unless it be of one of the denominations prescribed, but does not require that all three of the denominations shall be issued.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Edward T. Fairchild, for the appellant.

For the respondents there was a brief signed by *Turner, Hunter, Pease & Turner*, of counsel; by *Francis E. McGovern*, attorney for the *County Board of Supervisors, Frank J. Lenicheck*, chairman, *George Thuering* and *Frank O. Phelps*, county treasurers; and by *Chester B. Masslich* and *Eugene Dupee*, attorneys for *E. H. Rollins & Sons, John Farson, Arthur B. Leach, Ferry W. Leach*, and *James G. Campbell.* There was also a supplemental brief and oral argument by *W. J. Turner*, of counsel.

WINSLOW, J. This is an action in equity brought by a taxpayer of Milwaukee county to enjoin the issuance and sale of negotiable county bonds amounting to $450,000 for the purpose of building a viaduct across the Menominee valley, connecting Grand avenue on the east side of said valley with Grand avenue extended on the west side thereof. Certain corporations and firms which had contracted to purchase said bonds were made defendants, together with the county officers. The bonds were about to be issued under the provisions of ch. 444, Laws of 1903. The defendants answered jointly, and, the plaintiff having demurred generally to the answer, the demurrer was overruled as a demurrer to the answer, but sustained as a demurrer to the complaint, and the plaintiff appeals.

The first and most important contention made by the appellant is that said ch. 444 is a special or private law, and hence is unconstitutional under the provisions of sec. 31, art. IV, Const., which prohibits the enactment of special or private laws for various purposes, including the laying out of highways, assessment or collection of taxes, and for the granting of corporate powers or privileges. The law thus attacked is entitled:

"An act to authorize the building and construction of viaducts across valleys, gullies, running streams or railroad tracks by counties in this state of a population of 150,000 or more and for the issuing of county bonds therefor."

The first section provides that:

"The county board of supervisors of any county within this state which now has or may hereafter have according to any state or national census taken a population of 150,000 or more, is hereby authorized and empowered to erect, construct and maintain any viaduct or bridge over and across any gully, river or valley, or railroad track or tracks agreeable to the conditions and provisions of this act and subsisting laws applicable thereto, when in the opinion of such county board the erection of such viaduct or bridge shall be for the best inter-

ests of the county and inhabitants thereof, which opinion shall be rendered by resolution duly adopted by the county board of supervisors of such county, at any legal meeting thereof. Such viaduct or bridge shall be constructed of such length, width and height as the said county board of supervisors may by resolution determine."

The remaining sections of the act contain detailed provisions governing the manner in which the work shall be done, the contracts let, and the bonds issued, as well as provisions for the levying of taxes to pay the principal and interest of the bonds.

The county of Milwaukee is the only county in the state having a population of 150,000, and the claim is that this law is evidently a law passed solely for Milwaukee county, and is consequently a special or private law and not a general one. The ultimate and controlling question is whether classification of counties by population is a proper classification as relating to legislation concerning the building of public improvements. If it be proper classification, then the law is a general one, notwithstanding the fact that there is now but one member of the class. If not, then the law must be held special. *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869. The general rules governing classification have been frequently stated, and may be said to be briefly as follows: The classification must be based on substantial and real differences in the classes, which are germane to the purpose of the law and reasonably suggest the propriety of substantially different legislation, the legislation must apply to each member of the class, and the classification must not be based on existing circumstances only, but must be so framed as to include in the class additional members as fast as they acquire the characteristics of the class. *State ex rel. Risch v. Trustees,* 121 Wis. 44, 98 N. W. 954, and cases cited on page 53 (98 N. W. 957). Applying these general rules to the law here attacked, it is at once seen that the classification is not based on existing facts

only, but is so framed as to admit additional members, so that there is but one question, and that is whether the classification is based upon a substantial and real difference which is germane to the purpose of the law, and suggests the propriety of such a law to govern a county of 150,000 inhabitants while denying it to counties with lesser population. A marked and substantial difference in population is, of course, a real difference, but does it suggest the propriety of greater powers in the matter of the construction of such public improvements than the ordinary powers possessed by smaller counties? If this question related to cities instead of counties, then there would seem to be no doubt that it should be answered in the affirmative. That large and populous cities need better, safer, and more expensive highways and bridges for the accommodation of their teeming populations than small communities no one will deny. The simple rural highway and the inexpensive bridge may be ample for all purposes in the village or small city, while for the congested conditions of the great city the asphalt pavement and the broad and expensive bascule bridge may be not only proper, but absolutely essential to human safety. Classification of cities by population, and the enactment of general laws for each class according to its needs, has been so often approved by this court that it has become part of the fundamental law of the state. *State ex rel. Risch v. Trustees, supra.* No good reason is perceived why the same considerations, in a somewhat modified degree perhaps, do not justify classification of counties by population as well as cities. Indeed, this court has affirmed the validity of an act providing for the payment of a salary to registers of deeds in lieu of fees in all counties containing a population of 150,000 or upwards, on the ground that the classification was proper, and hence that the act was a general act and not private or local. *Verges v. Milwaukee Co.* 116 Wis. 191, 93 N. W. 44. While the subject of classification was not discussed at length in this case, it is manifest that it could not have been

decided as it was except on the basis that the classification of counties by population in legislation relating to the payment of a salary in lieu of fees to the register of deeds was proper because germane to the subject; the idea doubtless being that in a populous county where many real-estate transfers are made, the fees provided by law would furnish an extravagant compensation to the register, while in small counties where the transfers are few in number the fee system would afford simply a reasonable compensation. So this court sustained the validity of a law granting to town boards of supervisors all the powers of village boards (with certain exceptions) where the town contained an unincorporated village containing not less than 1,000 inhabitants, and held it to be a general act. *Land, L. & L. Co. v. Brown,* 73 Wis. 294, 40 N. W. 482. This decision could evidently only have been reached on the basis that classification of country towns by population was proper. Indeed, the language of the opinion on page 302 (40 N. W. 485) shows this to have been the basis, although the word "classification" is not used.

But, apart from these decisions, it seems apparent that a county of more than 150,000 population is quite certain to contain densely populated areas requiring means of intercommunication by way of highways and bridges far more elaborate and expensive than those which will fully satisfy the modest needs of a sparsely settled county, devoted principally to farming and containing only a few villages of small population. So we reach, without serious difficulty, the conclusion that the classification of counties by population in the law before us is germane to the subject covered by the law, and that the characteristics of the class suggest the propriety of such a law as applicable to the class, while refusing it to other counties not in the class.

A number of minor objections are made which will be briefly noticed. Our constitution (sec. 3, art. XI) provides that any municipality incurring an indebtedness "shall, be-

fore or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." Sec. 10 of the act in question also provides as follows:

"It shall be the duty of any county board of supervisors which shall have determined upon the building of any viaduct under the provisions of this act, at or before issuing any bonds in pursuance hereof, to provide for the payment of the interest and the ultimate payment of the principal, of any and all bonds which shall be issued under and by virtue of this act; and for that purpose such county board of supervisors is hereby authorized and required at or before the issue of any such bonds shall have been determined upon, to provide for the assessment, levy and collection of a direct annual tax upon all the taxable property of such county in which such viaduct shall be located, sufficient to pay the interest on such bonds so issued, and also to provide for the levy and assessment of a direct tax, sufficient to pay and discharge the principal of said bonds, as the same shall mature and to collect the same in the manner as other taxes are levied and collected by law."

In attempted compliance with these constitutional and statutory requirements, the county board of Milwaukee county, at the same time that it passed the resolution directing the issuance of the bonds, also passed a resolution providing that to meet the principal and interest thereof "there is hereby levied on all the taxable property of the county in each of the twenty years 1905 to 1924, inclusive, a tax in the sum of $22,500 for the payment of the principal of said bonds," also in each of said years the amount set opposite each year, respectively, for the payment of interest (the amount of the interest levy for each year being specified). It is said that the board had no authority to levy a tax for any year beyond the current year, and hence that the attempted levy for future years is invalid, and the constitutional requirement has not been met. This contention logically means that no municipal debt can be incurred without levying a tax to pay the entire principal and

interest during the current year, a result which is as absurd as it is plainly contrary to the plain import of the constitutional provision. So far as ordinary tax levies are concerned, the county board cannot make tax levies for future years, but it was just this difficulty which the constitutional provision named was framed to meet and correct, as fully explained in the case of *Kyes v. St. Croix Co.* 108 Wis. 136, 83 N. W. 637. In that case it was held that neither the constitutional provision aforesaid nor a statutory provision identical in terms with sec. 10 was satisfied by the mere passage of a resolution providing that there "shall be annually levied by the county board" sufficient sums to meet the principal and interest of the bonds as they fall due, for the reason that such a resolution was not an exercise of the county board's legislative power to levy a tax, but a mere promise, or command to future boards to do so. We have no disposition to review or change the rule announced in that case. Following that rule, it is evident that the action taken in the present case was correct, and indeed the only action which would satisfy the constitutional and statutory requirements. The objection that some of the taxes might become delinquent and not be paid until after sale, and hence that the entire amount might not be in hand at the time when the annual instalments fall due, is not deemed of sufficient dignity to require treatment. The levies provided for, if collected when due in regular course, will meet all instalments of principal and interest as they become due. This must be held to be a sufficient provision.

The law in question requires the county treasurer to execute an additional bond with sureties, in double the amount of the proposed bond issue, within thirty days after it has been determined to issue such bonds, and before he shall receive the bonds or any money derived from the sale thereof. It appears that the county treasurer filed a bond July 1, 1905, which was approved by the county board August 8, 1905, but was subsequently discovered not to contain all the conditions

required by the statute, and in September following, and before receiving any bonds or money, filed a new bond containing all the necessary conditions, which was duly approved by the county board. It is claimed that the proposed bond issue must be enjoined because of failure to file the bond within the required time. This contention must fail. The purpose of the bond is simply to indemnify the county against loss resulting from the failure of the treasurer to perform his duty. The requirement as to the exact time when it shall be filed is plainly directory only, at least so long as it is filed before the treasurer's duties begin. Neither the treasurer nor his sureties could be heard to say that it was void because not given within the prescribed thirty days. Murfree, Official Bonds, §§ 321, 583.

The law provides that the bonds issued under this act shall be "in the sum of one thousand dollars, five hundred dollars, and one hundred dollars each, the number of bonds of such denomination to be fixed by the county board of supervisors." The resolution of the county board provided for the issuance of $1,000 and $500 bonds, but not for the issuance of any $100 bonds, and it is claimed that the bond issue is illegal and should be restrained, because the law is mandatory and requires that all denominations *shall* be issued. The law is doubtless mandatory to the extent that no bond can be lawfully issued under it unless such bond be of one of the denominations prescribed; but should its mandatory character be construed as extending any further? We think not. If it had been intended to require that all three denominations should be issued, with the idea perhaps that small investors should have an opportunity to subscribe as well as large ones, it would seem that the legislature would certainly have guarded the provisions by fixing at least a minimum proportional amount of the smaller bonds which must be issued. Instead of any such provisions, however, the legislature expressly authorized the county board to fix the "number of

bonds of such denominations" to be issued, thus making it possible for the board to issue all three denominations and yet issue but one bond of $100. Thus the letter of the law would be fully complied with, but its spirit (on the basis that it is mandatory) would be set at naught. Again, the provision last quoted says that the county board shall fix the number of bonds of "such denomination," not of "each" denomination. The word "such" must have been used advisedly, and must, it seems, refer to such denomination as the board shall determine to issue, otherwise it would seem to have no appropriate place in the sentence. These considerations lead us to the conclusion that the law does not require that all the denominations shall be issued in a given bond issue.

Some minor objections are made which do not seem well taken or worthy of special treatment.

By the Court.—Order affirmed.

PRAHL and wife, Respondents, vs. ROGERS, imp., Appellant.

February 5—February 23, 1906.

Mortgages: Foreclosure: Practice: Writ of assistance: Issuance: Notice: Sufficiency of grounds of motion to vacate: Laches: Failure to seal writ: Amendment: Waiver.

1. Under sec. 3187, Stats. 1898 (providing that from the time of the filing of the notice therein authorized the pendency of the action "shall be constructive notice thereof to a purchaser or incumbrancer of the property affected thereby; and every purchaser or incumbrancer whose conveyance or incumbrance is not recorded or filed shall be deemed a subsequent purchaser or incumbrancer and shall be bound by the proceedings in the action to the same extent and in the same manner as if he were a party thereto"), and sec. 3169 (providing, as to the effect of a sheriff's deed of foreclosure and the confirmation of the sale, that the same shall vest in the purchaser all the right,

title, and interest of the mortgagor, his heirs, personal representatives, and assigns in and to the premises sold, and shall bar all claim, right, and equity of redemption therein, of and against the parties to such action, their heirs and personal representatives, and also against all persons claiming under them subsequent to the filing of the notice of the pendency of the action in which such judgment was rendered; and the purchaser, his heirs and assigns shall be let into possession of the premises so sold on production of such deed or a duly certified copy thereof, and the court may, if necessary, issue a writ of assistance to deliver such possession), and in the absence of a rule of court in that behalf, there is no restraint upon the circuit court as to the necessary proceedings preliminary to the issuance of a writ of assistance to enforce the rights of a purchaser at a foreclosure sale. The circuit court may or may not require notice of the application to be given the occupant, as in its judgment may seem best in the particular case.

2. Under said secs. 3169, 3187, Stats. 1898, as to premises sold under a foreclosure judgment, one who has connected himself with the title by purchase of the equity of redemption after the filing of a *lis pendens*, as well as an occupant, actual or constructive, is deemed a party to the action and, therefore, chargeable with notice that the ordinary and usual proceedings in the execution of the judgment will occur, including the issuing of a writ of assistance.

3. The foregoing paragraph has no reference to cases where there is a party in possession under title not reached by the foreclosure judgment.

4. On a motion to vacate a writ of assistance issued to put the grantee of a purchaser at foreclosure sale into possession, it was alleged that the purchase at foreclosure sale was, or should have been, made in the interest of the holder of the equity of redemption, under whom the moving party claimed, and that the grantee of the purchaser at the foreclosure sale was chargeable with notice that he was a mere successor trustee to the moving party. The allegations were wholly on information and belief and were unequivocally denied. *Held*, that the showing made was insufficient to indicate, with reasonable probability, that the claim of the moving party could be maintained, and that the court was justified in denying the motion and in refusing to leave the moving party to his ordinary remedy to test the truth of the matter.

5. In the absence of equities superior to or impairing the right of one holding a sheriff's deed issued on a foreclosure sale to apply

for a writ of assistance, mere delay on his part is not sufficient to warrant denying the writ.

6. The right to a writ of assistance is not absolute, and while grounds for withholding it, in the court's discretion, may exist, yet one holding a sheriff's deed on a foreclosure sale, duly confirmed, is *prima facie* entitled to the writ to put him in possession of the subject of the purchase.

7. The omission of the seal of the court from a writ of assistance is, under sec. 2829, Stats. 1898, an amendable irregularity, and is waived by an appearance and motion to set aside the writ on its merits.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

The appeal was from an order denying a motion to set aside a writ of assistance.

May 12, 1897, Johanna Wrege, who was then possessed of a homestead right and also a one-third interest in the fee to the land in question, mortgaged, in form, the whole title to the plaintiffs to secure payment of a note for $1,000. She did not thereafter marry. August 30, 1897, subject to such mortgage, she in form conveyed the whole title to Mary Roe, who later by marriage became Mary Stadlbauer, the transaction being accompanied by an agreement as to the mortgage indebtedness, which was later passed upon by the court as hereafter mentioned. In January, 1898, the entire title to the property, subject to such mortgage, was by appropriate conveyances vested in Mary Roe, fully discharging the covenants for title contained in her deed. Subsequently Mary Roe, in form, conveyed the entire property to August E. Stadlbauer, who, as before stated, later became her husband. Subsequently a suit was commenced to foreclose such mortgage, Mary Roe (*nee* Stadlbauer) and August E. Stadlbauer being made defendants, and a notice of the pendency of the action being duly filed. The Stadlbauers appeared and answered. Such proceedings were thereafter duly had in the action that May 1, 1899, judgment was rendered in plaintiff's favor charging Johanna Wrege and the Stadlbauers with personal liability

for the mortgage indebtedness, and for foreclosure and sale in due form. It was provided in the judgment in accordance with the statute covering the matter, as follows:

"After the confirmation of the sale . . . the purchaser, or purchasers, . . . his or their heirs or assigns, be let into possession of the premises so sold, on the production of the said sheriff's deed or deeds, or a duly authenticated copy thereof. And that each and every of the parties to this action, who may be in possession of the premises described in such deed or deeds, and every other person who since the filing of such notice of the pendency of this action has come into possession of the same . . . shall deliver to such grantee or grantees, in such deed or deeds, his or their heirs or assigns, possession of such portion of said mortgaged premises . . . on production of such deed or deeds, or an authenticated copy or copies thereof. . . . The defendants and their heirs respectively, and all persons claiming under them, or any or either of them, after the filing of such notice of pendency of this action, be forever barred and foreclosed of all right, title, interest, and equity of redemption in said mortgaged premises, except the right of redemption before such sale, as provided by statute."

June 11, 1900, the mortgaged premises were sold pursuant to the judgment to the National Realty Company, the sale being perfected by a sheriff's deed and a confirmation by the court in due form. The Stadlbauers were in possession of the property at the time of the foreclosure proceedings. Subsequent to the foreclosure sale they, in form, conveyed the property to John B. Amazeen, who later, in form, conveyed the same to Charles Fitz Gerald, who later under a contract with appellant *Michael B. Rogers,* as his executory vendee, put the latter into possession of the property. *Rogers* so remained up to the time of the application for the writ. Petition was made for such writ July 14, 1905, on behalf of *Henry F. Durbin,* who was then owner of the property under proceedings and instruments duly conveying to him the title acquired as aforesaid by the National Realty Company. The petition set forth, in the main, the facts above stated, and further that certified

copies of the sheriff's deed and the order confirming the sheriff's sale, and due evidence of the title acquired at the sale having passed to *Durbin,* were exhibited to *Michael B. Rogers,* and possession of the premises demanded of him, which demand was refused. The writ was issued July 15, 1905. Motion was made on behalf of *Michael B. Rogers* and Charles Fitz Gerald, his executory vendor, to set aside the writ, the motion being based upon affidavits to the effect that no notice of the application therefor was served upon them or either of them, and further showing on information and belief that at the time of the foreclosure sale Henry Herman, as agent of the Stadlbauers, had in his possession money with which to buy in the property in their interest and with instructions to so do; that in breach of his trust he caused the same to be conveyed to the National Realty Company; that the agencies of such company and all those concerned in the title under it down to and inclusive of the applicant for the writ were informed of that situation; that the National Realty Company never was possessed of any interest in the property, except as trustee for the Stadlbauers, and that although the legal title to the property passed to such company and through mesne conveyances to the applicant for the writ, the equitable title was in *Michael B. Rogers,* the executory vendee of Charles Fitz Gerald. There were opposing affidavits to the effect that *Henry F. Durbin* at the time he acquired his interest in the property had no knowledge, or information, or any ground of belief, or suspicion in respect to any of the matters stated in the affidavits in support of the motion to set aside the writ, as to the property having been bid in, or authorized to be bid in, at the foreclosure sale in the interest of August E. Stadlbauer.

The motion to vacate the writ was denied and *Rogers* appealed.

For the appellant there was a brief by *Vilas, Vilas & Freeman,* and oral argument by *C. A. Vilas.* They contended,

inter alia, that the appellant should have had notice of the application for the writ of assistance in order that he might have opportunity to appear and protect his interests. Secs. 3025, 3169, Stats. 1898; *Loomis v. Wheeler,* 21 Wis. 271; *Benhard v. Darrow,* Walk. (Mich.) 519; *Hopper v. Yonge,* 69 Ala. 484; *Wiley v. Carlisle,* 93 Ala. 237; *San Jose v. Fulton,* 45 Cal. 316; *Oglesby v. Pearce,* 68 Ill. 220; *Blauvelt v. Smith,* 22 N. J. Eq. 31; *Jones v. Hooper,* 50 Miss. 510; *Rawiszer v. Hamilton,* 51 How. Pr. 297; *Knight v. Houghtalling,* 94 N. C. 408; *Bell v. Birdsall,* 19 How. Pr. 491. In doubtful cases the writ should be refused and the parties left to litigate their contested rights in the proper court. *Wiley v. Carlisle,* 93 Ala. 237; *Hooper v. Yonge,* 69 Ala. 484; *Schenck v. Conover,* 13 N. J. Eq. 220; *Thomas v. De Baum,* 14 N. J. Eq. 37; *Chadwick v. Island Beach Co.* 42 N. J. Eq. 602; *Barton v. Beatty,* 28 N. J. Eq. 412; *Henderson v. McTucker,* 45 Cal. 647; *Blauvelt v. Smith,* 22 N. J. Eq. 31; *San Jose v. Fulton,* 45 Cal. 316; *Langley v. Voll,* 54 Cal. 435, 437; *Tevis v. Hicks,* 38 Cal. 234. The writ, being summary in character, should be refused by the court when the purchaser, seeking its aid to enforce his possession, has been guilty of such delay as to leave it doubtful whether or not he has given the person in possession the right to remain. *Hooper v. Yonge,* 69 Ala. 484; *Planters' Bank v. Fouwlkes,* 4 Sneed, 461.

For the respondent there was a brief signed by *T. L. Kennan,* attorney, *Quarles, Spence & Quarles,* of counsel, and *T. W. Spence,* of counsel for petitioner, and oral argument by *Mr. Spence.*

MARSHALL, J. Counsel for appellant with much authority presses upon our attention the idea that a writ of assistance to put a purchaser at a foreclosure sale in possession of the property should only be issued upon notice to the occupant, and should not be issued at all against one not a party to the

foreclosure suit. There is this fundamental infirmity in that position. It is based mainly on decisions in other states under statutes or court rules differing from ours and decisions and practice at common law. It is useless, generally, in treating a matter of procedure to go outside of our own statutes and court rules, and decisions applying the same. They make up the system in its entirety for all judicial proceedings in this state. *Kollock v. Scribner,* 98 Wis. 104, 117, 73 N. W. 776. On the question of what is the appropriate remedy in a given situation and how to invoke judicial instrumentalities in respect to the matter, and everything that has to do with remedies and procedure to make them efficient, the Code and court rules as uniformly applied under the direction of this court control. Less attention to common-law forms and practices and less attention to decisions in other states, and more attention to the written law as found in our statutes and rules of court, as construed and applied, would greatly promote the administration of justice.

Sec. 3187, Stats. 1898, provides that from the time of the filing of the notice therein authorized the pendency of the action "shall be constructive notice thereof to a purchaser or incumbrancer of the property affected thereby; and every purchaser or incumbrancer whose conveyance or incumbrance is not recorded or filed shall be deemed a subsequent purchaser or incumbrancer and shall be bound by the proceedings in the action to the same extent and in the same manner as if he were a party thereto," and sec. 3169, Stats. 1898, provides, as to the effect of a sheriff's deed of foreclosure and the confirmation of the sale, that the same "shall vest in the purchaser all the right, title and interest of the mortgagor, his heirs, personal representatives and assigns in and to the premises sold and shall be a bar to all claim, right or equity of redemption therein, of and against the parties to such action, their heirs and personal representatives, and also against all persons claiming under them subsequent to the filing of

the notice of the pendency of the action in which such judgment was rendered; and the purchaser, his heirs and assigns shall be let into the possession of the premises so sold on production of such deed or a duly certified copy thereof, and the court may, if necessary, issue a writ of assistance to deliver such possession."

The manner of obtaining the writ, it will be seen, is left entirely to the wisdom of the court, in the absence of any rule on the subject prescribed by this court, and there is none. The trial court may require notice to the occupant of the property of the application for the writ or not as in his judgment may seem best in the particular case. What would be proper and reasonably necessary in one case might not be in another. Formerly there was a rule allowing the writ to be issued by the clerk. Under that it was held that without an order of court the clerk could not act as against one not a party to the record. That is the effect of *Loomis v. Wheeler,* 21 Wis. 271, cited by counsel for appellant, when read in connection with *Goit in the suit of Knapp v. Dickermann,* 20 Wis. 630. The rule was adopted without a very careful regard for the language of the statute providing for its issuance only by the court or pursuant to its order. It was not altogether easy, it will be seen, by reference to the two cases cited to administer the statute in its letter and at the same time give effect to the rule in its letter. That difficulty long ago was remedied by a discontinuance of the rule. *Loomis v. Wheeler, supra,* however, remains and is liable to lead one astray as it seems to have done in this case. It is best to disregard the case altogether and look to the statute, which puts no restraint whatever upon the court as to necessary proceedings preliminary to the issuance of the writ. It will be observed that *Goit in the suit of Knapp v. Dickermann, supra,* so far as it treats of the authority of the court to issue the writ, clearly recognizes that no notice to the occupant is necessary. Attention is there called to the fact that the practice

in New York under a similar statute is to issue the writ *ex parte*.

The written law provides, specially, for the issuance of a writ of assistance in most cases where one is needed. Doubtless, under the general statutory grant of authority as to the issuance of writs one might be issued, if necessary, in a case not so expressly provided for, the act to be characterized by such reasonable procedure as to the court might seem just. As we have seen in the statute in question no notice is required in harmony with the fact that the occupant of the property, actually or constructively, is deemed to be a party to the action, and, therefore, chargeable with notice that the ordinary and usual proceedings in the execution of the judgment will occur. In case of title under a sale on execution notice is required under sec. 3025, Stats. 1898. The same is true in case of title acquired in condemnation proceedings under sec. 1850, Stats. 1898.

The proposition that the writ of assistance in a case of this sort can only issue against a party to the record is answered by the statute to which we have referred quite as definitely as the proposition we have already specially treated. The one provides that a person who connects himself with the title to the subject of the foreclosure subsequent to the commencement of the action under one who is a party thereto, after the filing of the notice of the pendency of the action is to all intents and purposes a party to the action, and the other provides that the judgment and deed of foreclosure and its confirmation shall bind equally the parties to the action who are named and those coming into privity with them after the filing of the notice of the pendency of the action. All are liable to be dealt with in proceedings for the execution of the judgment as equally bound. As it has been said:

"The judgment is binding on all parties against whom it was rendered, and all others coming into possession under them after suit brought, and not in pursuance of a specific

right in the property previously acquired. Against all such, the writ of assistance should be executed by the officer." *Gelpeke v. M. & H. R. Co.* 11 Wis. 454, 461; *Smith v. Pretty,* 22 Wis. 655; *Brown v. Cohn,* 88 Wis. 627, 635, 60 N. W. 826; *Cypreanson v. Berge,* 112 Wis. 260, 264, 87 N. W. 1081.

The foregoing has no reference whatever to cases where there is a party in possession under title not reached by the foreclosure judgment. In that situation or in case of a fair controversy as to whether such situation exists the parties should be left to their remedy by action. *Smith v. Pretty, supra; Stanley v. Sullivan,* 71 Wis. 585, 37 N. W. 801.

The claim that the purchase at the foreclosure sale was, or should have been, made in the interest of August E. Stadlbauer, under whom appellant claims, and that respondent is chargeable with notice that he is a mere successor trustee for appellant, rests wholly on information and belief and was unequivocally denied by and on behalf of respondent. Had the papers used on the motion to set aside the writ shown a reasonable probability that the claim of the appellant could be maintained, the court would have been justified, if not required, to leave respondent to his ordinary remedy by action to test the truth of the matter. Evidently the trial court did not consider the showing made was sufficient to indicate any such probability, and in our judgment it was fully warranted in so holding.

True, there was considerable delay in applying for the writ, but mere delay in such a case is not sufficient to warrant denying the use of the remedy. It does not appear that any right adverse to respondent accrued during the delay nor is in any way attributable thereto. No equities superior to nor impairing in any respect the right of respondent appear to have been created subsequent to the entry of the foreclosure judgment. The right to the remedy is not absolute. Grounds for withholding it in the discretion of the court may exist.

The court is clothed with pretty broad discretionary power in respect thereto, but after all, one holding a sheriff's deed issued on a foreclosure sale, duly confirmed, is *prima facie* entitled to his writ to be put in possession of the subject of the purchase. It cannot be withheld without some reasonable cause, mere delay not being sufficient. As it is said, "where there is no ground for the discretionary withholding of the right it (the writ) issues *ex debito justitiæ* and as much a matter of course as an execution on a judgment."

It seems that the seal of the court was omitted from the writ. That was an amendable irregularity, which was waived by the appearance and motion to set aside the writ on its merits. In the circumstances of the appellant's procedure it falls under sec. 2829, Stats. 1898, as counsel for respondent suggests.

By the Court.—The order is affirmed.

MARLING, Respondent, vs. NOMMENSEN, imp., Appellant.

February 5—February 23, 1906.

Negotiable instruments: Payment to other than holder: Agency: Mortgages: Payment to mortgagee after undisclosed assignment: Assumption of mortgage debt: Recording of instruments: Notice: Statutes: Estoppel.

1. The maker of a negotiable promissory note can satisfy it only by payment to the owner at the time or to such owner's authorized agent. If the recipient of the money is not actually authorized the payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note.
2. Such rule applies generally to all negotiable paper independently of the existence of any mortgage or other security.
3. Such rule seems to be without applicability to defeat effectiveness

of payment to the original mortgagee, as against an unknown assignee, where other than negotiable instruments are involved.

4. Where a vendee of lands, at the time of bargaining for the premises, was given the option to buy the premises subject to a mortgage, in that case assuming the debt, or to buy clear of the mortgage upon the payment of the entire sale price to the vendor, and the vendee elected to do the latter, the vendee, as between himself and his vendor, does not become liable for the mortgage debt.

5. Sec. 2241, Stats. 1898, declaring void any unrecorded conveyance as against a subsequent purchaser whose conveyance shall first be duly recorded, does not exclude all other adverse effect than that which it denounces against one who neglects to place his conveyance on record.

6. One who acts inconsistently with the truth under such circumstances that, as a reasonable person, he ought to anticipate that another is likely to change his position in reliance on such conduct, will be estopped to assert the truth to the injury of such other.

7. Since the adoption of the system of public registry of conveyances, the custom of prompt registration is so nearly universal that omission may be held to be neglect of those precautions customarily taken to assert a grantee's rights in land, and hence it is to be expected that one receiving a conveyance will act confidently on the assumption that all rights will appear from such record.

8. Plaintiff, owning a mortgage by an unrecorded assignment, knew that the land was held by a dealer in real estate with consequent likelihood of its sale, and it was apparent to the assignee that the record advertised the mortgagee as the person to whom a purchaser must apply, either to clear the title from the lien of the mortgage or for information as to the validity or amount of the lien. *Held*, that the assignee thereby negligently placed it in the mortgagee's power to deceive or mislead a purchaser, who, both by law and custom, would have a right to rely upon the record.

9. Such withholding of the assignment from record was a persistent declaration to all persons dealing merely with the title that the mortgagee owned the mortgage.

10. A mortgage on lands owned by a dealer in real estate was assigned to plaintiff by the mortgagee prior to a sale of the lands to defendant. The vendee in such sale had the option to assume the mortgage as part of the purchase money, or buy clear of the mortgage upon payment to the vendor of the entire sale price, and elected to do the latter. At the time of the consummation

of the sale the vendor paid to the mortgagee the amount of the mortgage and obtained from him a satisfaction of the mortgage, the mortgagee promising to obtain and surrender the mortgage and note within a few days, which he failed to do, but instead absconded, a defaulter. The satisfaction piece was delivered to the defendant and recorded before plaintiff's assignment was recorded. There was nothing to impugn defendant's good faith, and she paid the full price for the land in reliance upon her attorney's examination of an abstract showing only the mortgage, the satisfaction of which was delivered at the same time. *Held*, that plaintiff was estopped, as against defendant, to deny the mortgagee's continued ownership and authority to discharge the mortgage, and that therefore defendant held the land discharged from the lien of the mortgage.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

On November 3, 1897, the defendant Milwaukee Realty Company executed its negotiable note and a mortgage securing the same upon certain premises in Milwaukee to Henry Herman. Said note was guaranteed by the defendants Agnew and Maynard. On December 10, 1897, Herman duly transferred said note and mortgage to the plaintiff, delivering the same to her with a written assignment, which she thereafter always retained, but did not record the assignment until April 17, 1903. On July 5, 1902, the Milwaukee Realty Company agreed on a sale of said property to the appellant. She paid $10 down, and received a receipt in the following words:

"July 5/02.

"Received of B. Nommensen Ten Dollars to apply on purchase of No. 180 Chambers St. (40 x 60 ft.) Total purchase price of said premises being $2950. net. There being on said premises a mortgage of $1800, which said Nommensen or his assigns agrees to assume as part of the purchase price of said premises. The balance of said purchase price shall be paid as follows: $240. July 7/02, $320. July 8/02 & $580. August 30/02, or the said Nommensen may pay all of the balance of said purchase price, viz. $2940. on or be-

fore Sept. 1st/02. Land contract and abstract of title will be furnished at any time on demand, all deferred payments to bear interest at the rate of 6 % per annum.

"A. D. AGNEW."

Appellant notified the realty company of her election to pay the whole purchase price and receive a clear title to the premises, and on September 12, 1902, paid the balance then remaining, together with interest, amounting to $2,402. Her attorney, who accompanied her, examined the abstract, and discovered the mortgage in question running to Henry Herman, and the realty company, acting by Agnew, delivered Herman's release. The attorney asked for the note and mortgage, and was told that Herman would send them to Agnew within a few days, whereupon appellant could call for them. On such assurance title was accepted in reliance on the abstract and the release, a warranty deed being made by the realty company to appellant. Such release of mortgage and the deed were recorded, respectively, May 8, 1903, and July 6, 1903. The release was obtained by Agnew from Henry Herman by payment to him of the amount of the mortgage by the Milwaukee Realty Company. He informed Agnew that he did not then have in his possession said note and mortgage, but promised to obtain them within a few days. In the spring of 1903 Herman absconded, a defaulter. Appellant has been in possession of the premises by the collection of rents ever since the purchase in July, 1902. None of the defendants had any knowledge of the transfer of the mortgage to plaintiff, nor had plaintiff any knowledge of the purchase of the premises by appellant or of the payment of the mortgage to Herman. She had never given Herman any authority to collect it. Plaintiff commenced this action to foreclose said mortgage, demanding deficiency judgment against defendants Milwaukee Realty Company, Maynard, and Agnew. Appellant set up the discharge, both as a defense and as a counterclaim, with prayer for quieting her title against plaintiff. Upon

findings substantially in accordance with the facts above stated, judgment was entered in accordance with the prayer of the complaint, from which the defendant *Nommensen* appeals.

For the appellant there was a brief by *Lenicheck, Fairchild & Boesel,* and oral argument by *F. T. Boesel.*

For the respondent there was a brief by *Turner, Hunter, Pease & Turner,* and oral argument by *L. S. Pease.*

DODGE, J. Appellant contends for reversal upon two theories: First, that the debt secured by plaintiff's mortgage is paid and the mortgage, therefore, discharged; and, secondly, on the ground that she is estopped to set up such mortgage against appellant, even if the debt be not paid. The first ground is fully negatived by our former decisions. The maker of a negotiable promissory note can satisfy it only by payment to the owner at the time or to such owner's authorized agent. If the recipient of the money is not actually authorized the payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note. This rule applies generally to all negotiable paper independently of the existence of any mortgage or other security. 3 Randolph, Com. Paper, §§ 1444, 1450; *Bartel v. Brown,* 104 Wis. 493, 80 N. W. 801; *Kohl v. Beach,* 107 Wis. 409, 83 N. W. 657; *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423; *Biggerstaff v. Marston,* 161 Mass. 101, 36 N. E. 785; *Murphy v. Barnard,* 162 Mass. 72, 38 N. E. 29; *Bromley v. Lathrop,* 105 Mich. 492, 63 N. W. 510; *Church Asso. v. Walton,* 114 Mich. 677, 72 N. W. 998; *Hollinshead v. Stuart & Co.* 8 N. Dak. 35, 77 N. W. 89; *Manhattan Co. v. Reynolds,* 2 Hill, 140; *Mitchell v. Bristol,* 10 Wend. 492; *Williams v. Jackson,* 107 U. S. 478, 2 Sup. Ct. 814. Certain cases cited to support effectiveness of payment to original mortgagee as against unknown assignee do not deal at all with negotiable instruments, and, therefore,

are without applicability. *Van Keuren v. Corkins*, 66 N. Y. 77; *Barnes v. Long Island R. E. Exch. & Inv. Co.* 84 N. Y. Supp. 951. Some contention is made that appellant assumed the debt, and that the payment to Herman must be deemed to have been made by her, thus subjecting her to the principle above stated. We are clear, however, that the premise to this reasoning is incorrect. The clear meaning of the receipt given at the time of bargaining for the premises was that appellant might, at her election, buy the premises subject to the mortgage, in that case assuming the debt, or might buy clear of the mortgage upon payment of the entire sale price to the realty company. Beyond dispute she elected to do the latter and, therefore, never became liable for the debt as between herself and her grantor. We do not understand the finding that said written receipt contained words of assumption to mean that appellant agreed to assume. If that be the meaning, it would be contrary to the undisputed evidence.

Turning, then, to the second ground of defense, we must first overrule some contention in appellant's favor based on sec. 2241, Stats. 1898, declaring void any unrecorded conveyance as against a subsequent purchaser "whose conveyance shall first be duly recorded," for the reason that appellant's conveyance, whether the release from Herman or the warranty deed from the Milwaukee Realty Company, was not recorded until after plaintiff's assignment. *Fallass v. Pierce*, 30 Wis. 443; *Potter v. Stransky*, 48 Wis. 235, 4 N. W. 95; *Girardin v. Lampe*, 58 Wis. 267, 16 N. W. 614; *Butler v. Bank of Mazeppa*, 94 Wis. 351, 68 N. W. 998; *Friend v. Yahr*, 126 Wis. 291, 104 N. W. 997. The real question to be considered is whether the statute above mentioned excludes all other adverse effect than that which it denounces against one who neglects to place his conveyance on record. It must be confessed that the final opinion in *Fallass v. Pierce* seems to proceed very much on that assumption, and some facts which might in that case have been urged as arousing estoppel

in pais were passed over, and the earlier conveyance sustained notwithstanding. Nevertheless the subject was not discussed, and the case is rather suggestive than decisive. In *Potter v. Stransky,* while the earlier unrecorded conveyance was sustained because the later one was not recorded, as an independent ground, the court dwelt with some industry on the presence of facts which excluded reliance by the second purchaser upon the absence of any record of prior conveyance; and in *Butler v. Bank of Mazeppa* there is intimation that a negligent purchaser might be affected by an estoppel outside the terms of the statute. *Girardin v. Lampe* and *Friend v. Yahr* both presented situations falling within the terms of the statute, the later conveyances being recorded before the earlier ones.

A moment's reflection must convince one that a prior purchaser may, by failure to record his conveyance, certainly in connection with other facts and circumstances, become estopped to rely on it against one whom he has led to believe and act upon its nonexistence, although he should afterwards get his conveyance on record before the later one. Certainly, if the assignee stood by and declared his nonownership to one about to buy or pay a mortgage to the original mortgagee, he would be estopped afterward to assert his assignment. The question, therefore, is whether such acts of either omission or commission are here presented as bring plaintiff within the general doctrine of estoppel. That general doctrine is that he who acts inconsistently with the truth under such circumstances that, as a reasonable person, he ought to anticipate that another is likely to change his position in reliance on such conduct, will be estopped to assert the truth to the injury of such other. *Two Rivers Mfg. Co. v. Day,* 102 Wis. 328, 78 N. W. 440; *Frels v. Little Black F. M. Ins. Co.* 120 Wis. 590, 597, 98 N. W. 522. The question presented, then, is whether plaintiff's act in not recording her assignment could have been anticipated by her as likely to induce

belief in others that Herman still owned it and lead them to act accordingly. Since the adoption of the system of public registry of conveyances, the custom of prompt registration has been so nearly universal that omissions may well be considered neglect of those precautions customarily taken to assert a grantee's rights in the land, and people generally have become accustomed to believe that all rights will so appear and to act confidently on that assumption; hence such conduct is to be expected by one holding an unrecorded conveyance. The land in question was held by a dealer in real estate, so that the likelihood of its sale was apparent to plaintiff. She must realize that, in event of sale, the record advertised Herman as the person to whom a purchaser must apply, either to clear the title from the lien of the mortgage or for information as to the validity or amount of that lien, and, therefore, negligently placed it in Herman's power to deceive or mislead a purchaser, who, both by law and by custom, would have the right to rely on the record. Her withholding her assignment from record was a persistent declaration to all persons dealing merely with the title to realty that Herman owned the mortgage. Of course, as to one dealing with the debt evidenced by a negotiable note, the actual possession by her of such instrument changed the situation; but that has no application to appellant.

The efficacy of a discharge by the record holder of a mortgage in favor of one dealing with the land in reliance thereon is a subject of some conflict of authority, as stated in *Whipple v. Fowler,* 41 Neb. 675, 687, 60 N. W. 15, where cases on both sides are cited, and the rule favoring such efficacy is adopted, in which view the following decisions concur: *Swartz's Ex'rs v. Leist,* 13 Ohio St. 419; *Cram v. Cotrell,* 48 Neb. 646, 67 N. W. 452; *Bullock v. Pock,* 57 Neb. 781, 78 N. W. 261; *Ogle v. Turpin,* 102 Ill. 148; *Havighorst v. Bowen,* 214 Ill. 90, 73 N. E. 402; *Williams v. Jackson,* 107 U. S. 478, 2 Sup. Ct. 814. In the recent case of *Friend v.*

Yahr, 126 Wis. 291, 104 N. W. 997, while the decision might have rested upon the statute absolutely avoiding the unrecorded assignment of the mortgage, the subject of estoppel was discussed, and the concurrence of this court with the line of decisions above cited was declared. We still adhere to that view, and feel convinced that plaintiff is estopped to deny Herman's continued ownership and authority to discharge this mortgage as against a purchaser of the property in good faith relying upon the public records. We can find nothing to impugn appellant's good faith. She paid the full price for the land in reliance upon her attorney's examination of an abstract from the records showing only a mortgage to Herman, his discharge of which was delivered at the same time. The consistency of just such acts with entire good faith is fully declared in *Friend v. Yahr,* as also the immateriality of the fact that the note and mortgage were not exhibited to her. We must therefore conclude that appellant holds the land in question discharged from the lien of plaintiff's mortgage.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in accordance with the prayers of appellant's counterclaim, as to her, and for further proceedings according to law.

RENNER, Respondent, vs. RENNER, Appellant.

February 6—February 23, 1906.

Divorce: Support of children: Judgments: Modification: Failure to make payments: Contempt.

1. Under sec. 2362, Stats. 1898 (conferring authority on courts to make provision in a divorce judgment for the care, custody, maintenance, and education of the minor children of the parties), sec. 2363 (authorizing revision and alteration of such judgments, and the making of a new judgment concerning the

minor children), and sec. 2364 (providing that, where a final division and distribution of the estate is decreed between the husband and wife, it shall not impair the power of the court in respect to revision of allowances for minor children under sec. 2363), the court in which a divorce action has proceeded to judgment has authority to make a new judgment concerning the allowance to minor children as the circumstances of the parents and the benefit of the children shall require, whether or not the original judgment contains any provision concerning such children.

2. Where a judgment of divorce made a final division and distribution of the husband's estate and awarded the custody of the minor children to the wife but made no provision for the minor children, the court may properly modify the judgment by requiring the husband to pay for their support.

3. Where such modified judgment specifically declared the allowance for the minor children to be a lien upon the husband's realty, such judgment may be enforced by contempt proceedings.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

On July 25, 1903, the circuit court for Milwaukee county awarded judgment in this action, decreeing a divorce between the parties and making a final division and distribution between the parties of the estate of the defendant. It was also adjudged:

"That the plaintiff is a fit and proper person to have, and is hereby awarded, the care, custody, and control of the infant children of the parties hereto, to wit, Joseph Renner, Rosa Renner, and Henry Renner; the defendant, however, having the right to visit and see said children at any and all reasonable times and apart from the plaintiff."

The judgment provided for a final division and distribution of the property of the parties and decreed that it was "in lieu of any alimony or other provision." On April 15, 1905, the court made an order, upon due proceedings, directing that the judgment be modified to the effect that the defendant be required and ordered to pay plaintiff, as for a contribution by him to the support and maintenance of the

minor children of the parties, the sum of $3 per week until the court should order or adjudge otherwise; the time of payment was specified, and defendant was ordered and required to pay the costs and disbursements particularly included in the order; and it was further ordered and adjudged that the sums due and remaining unpaid, pursuant to the order for the modification of the judgment, should be a lien on the real estate of defendant covered by the original judgment of division and distribution of the real estate between the parties. On July 8, 1905, plaintiff instituted proceedings, by petition and order to show cause, why defendant should not be punished as for a contempt for his disobedience in not complying with the direction of the court for the payment of the sums to plaintiff for the support and maintenance of their minor children, and the costs and disbursements therein specified. After hearing the parties upon this application the court made an order on July 15, 1905, adjudging that defendant was guilty of the contempt as charged, and further adjudging that he have five days to pay all of the sums due under the orders of April 15, 1905, together with the costs and disbursements allowed against him in this hearing, and in default of purging himself of such contempt he was to be attached and committed to the county jail until he should pay to plaintiff or her attorney the sums due and the sheriff's fees on such attachment and commitment. This is an appeal from the order adjudging defendant guilty of contempt and committing him to jail in default of his purging himself of the contempt by compliance with the order.

For the appellant there was a brief by *Hoyt, Doe, Umbreit & Olwell,* and oral argument by *A. C. Umbreit.*

For the respondent there was a brief by *Scheiber & Orth,* and oral argument by *C. A. Orth.*

SIEBECKER, J. It is argued that the court had no power to modify the original judgment, which provided that the

care, custody, and education of the minor children of the parties should be awarded to the plaintiff, and for a final division and distribution between the parties of their estate, "in lieu of any alimony and other provision" for the wife. This claim is based on the provisions of the statute prescribing what judgments the court may make concerning the care, custody, maintenance, and education of the minor children of the parties; the payment of alimony to the wife, and for allowances for the support of minor children committed to her care; or for a final division and distribution of the estate of the parties. The court decreed a final division of the estate of the parties and awarded to plaintiff the care, custody, and education of the minor children, without requiring that defendant make any contribution or payment for their maintenance and support. The power of courts in actions for divorce is wholly derived from the statutes on the subject. *Kempster v. Evans,* 81 Wis. 247, 51 N. W. 327; *Bassett v. Bassett,* 99 Wis. 344, 74 N. W. 780. We must then look to the statutes to ascertain what powers to revise and alter judgments in such actions are conferred on the courts. Sec. 2362, Stats. 1898, confers authority on courts to make provision in divorce judgments for "the care, custody, maintenance, and education of the minor children of the parties," and sec. 2363, Stats. 1898, authorizes revision and alteration of such judgments, and the making of new judgments concerning the minor children. The succeeding section provides in what cases the court may decree an allowance for the support and maintenance of the wife, and award an allowance to her for the support, maintenance, and education of the minor children committed to her care, and for making a final division and distribution between the parties of the estate involved, with a proviso that in case such final division and distribution of the estate be decreed between the husband and wife, it "shall [not] impair the power of the court in respect to revision of allowances for minor children under the next pre-

ceding section." The authority to revise and alter a judgment, from time to time, respecting the care, custody, maintenance, and education of minor children is thus expressly conferred, regardless of whether or not the original judgment directed that such an allowance should be paid by either party for their support. It is claimed that the authority so granted to alter and revise judgments is limited by the provisions of sec. 2369, Stats. 1898, to cases wherein the original judgment provided for the payment of alimony or other allowance for the wife and children, or either of them, as held in the case of *Bassett v. Bassett, supra,* upon the principle that, where the statute expressly grants "the authority to revise or alter a particular judgment, it impliedly prohibits the exercise of that power as to any other judgment." The judgment in the *Bassett Case* made no allowance for the wife, though she had asked for such relief in her complaint. It therefore followed by implication that it had been denied to her, and that the court had adjudicated the question for all time. But, as shown above, there is no such want of authority as to judgments respecting minor children. The preceding section expressly authorizes their revision and alteration from time to time, and provides that a decree for final division and distribution of the property of the parties, as awarded in this case, shall not impair such power. The case of *Bassett v. Bassett, supra,* is to be read in view of the facts before the court, which presented an application for a modification of a judgment wherein no provision for alimony or an allowance was made for her, and it was therefore held that under sec. 2369, Stats. 1898, "the trial court has no power to alter or revise a judgment for divorce unless the judgment itself shows that some provision was made for alimony, or some allowance made to the wife." We do not think the legislature by this section intended to restrict the power of courts to alter and revise divorce judgments, from time to time, concerning the care, custody, maintenance, and education of the minor children

of the parties, and we must hold that the courts have authority over their judgments of this character, to "make a new judgment concerning the same as the circumstances of the parents and the benefit of the children shall require," whether or not the original judgment contains any provision concerning them. The court properly modified the judgment by requiring defendant to pay the amount directed for the support of the minor children.

It is insisted that, in view of the provisions of the order modifying the judgment, the court erred in its adjudication that defendant was guilty of contempt in his omission to pay the sums directed, because the allowance so made for the support of the children is specifically declared to be a lien upon defendant's real estate, and payment could therefore be enforced under an execution. It is also claimed that, whenever this remedy exists, contempt proceedings are not permissible to compel enforcement of the court's orders.

We are of opinion that all the considerations submitted by the appellant against the validity of the order in the contempt proceedings are fully covered in the case of *Staples v. Staples*, 87 Wis. 592, 58 N. W. 1036, and that the order appealed from was properly made and is ruled by the decision in that case.

By the Court.—The order appealed from is affirmed.

WALASZEWSKI, Appellant, vs. SCHOKNECHT, Respondent.

February 6—February 23, 1906.

Master and servant: Personal injuries: Safety of place to work: Assumption of risk.

1. In the removal as in the original erection and construction of buildings, the rule that the master must furnish a safe place to work has very limited application.

2. Plaintiff, a man sixty-four years of age and of ordinary intelligence, while engaged as a workman in taking down a building, was injured by a board knocked off the building by a workman of an independent contractor. *Held*, that the dangers of the work plaintiff was doing were open and obvious, and hence plaintiff assumed the risk of the accident which happened.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

It appears from the record and is undisputed that the defendant and one Kleppe, as independent contractors, were engaged in taking down and removing a certain building, three stories high and veneered with brick, situated on the southeast corner of Jefferson and Knapp streets in Milwaukee. The defendant had the contract for taking down and removing the brickwork and employed three or four men for that purpose, and Kleppe had the contract for taking down and removing the woodwork and employed seven or eight men for that purpose. The work had progressed about one week when the plaintiff was employed by the defendant to wheel away bricks. The roof had been taken off a few days before. Between 8 and 9 o'clock on the morning of the second day the plaintiff was so employed, and while he was standing on the ground about ten feet from the southwest corner of the building a board sixteen feet long, ten inches wide, and one inch thick was knocked off from the outside of the third floor of the building by Kleppe's men, and the same fell and struck the plaintiff on the head and injured him, and this action is brought to recover the damages sustained by such injury. Issue being joined and trial had, the court at the close of the testimony directed a verdict in favor of the defendant upon the ground that the dangers of doing such work were open and obvious and hence that the plaintiff assumed the risk of his employment, and the defendant was not liable. From the judgment entered upon such verdict and for costs the plaintiff appeals.

For the appellant there was a brief by *Geo. H. Derry,* attorney, and *A. Kanneberg* and *W. C. Wehe,* of counsel, and oral argument by *Mr. Wehe.*

For the respondent there was a brief by *Nath. Pereles & Sons,* attorneys, and *Turner, Hunter, Pease & Turner,* of counsel, and oral argument by *C. F. Hunter.*

CASSODAY, C. J. Counsel for the plaintiff contends that the defendant was negligent in failing to furnish the plaintiff with a reasonably safe place in which to perform his work or to warn him of the danger in working where he did. The trial court did not pass upon that question, and for the purpose of this appeal we shall assume that the evidence was sufficient to take the case to the jury on the question of the defendant's negligence. The verdict was directed in favor of the defendant, on the ground that it appeared from the undisputed evidence that the dangers of doing the work were open and obvious and hence that the plaintiff assumed the risk. After careful examination we are constrained to hold that such ruling was correct. The plaintiff was sixty-four years of age and in the habit of doing all kinds of labor, and we must assume that he was a man of ordinary intelligence. As such he must have known that in taking down the building fragments were liable to fall from the upper portions thereof. In such removal of buildings as in the original erection and construction of buildings, the rule that the master must furnish a safe place to work can have but very limited application. In doing such work new adjustments and changes are continually going on from which danger may arise, against which no forecast can provide or warning be given. *Porter v. Silver Creek & M. C. Co.* 84 Wis. 418, 424, 54 N. W. 1019; *Larsson v. McClure,* 95 Wis. 533, 70 N. W. 662; *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 79 N. W. 22; *Liermann v. Milwaukee D. D. Co.* 110 Wis. 599, 601, 86 N. W. 182; *Kath v. Wis. Cent. R. Co.* 121 Wis. 503, 514, 99 N. W.

217. In the performance of such work an employee of mature years must be presumed to have known and appreciated all such risks of the employment as were open and obvious to a man of ordinary intelligence, and he must be regarded as having assumed the risk of all such dangers as he knew of or could have discovered by the exercise of ordinary care. *Osborne v. Lehigh Valley C. Co.* 97 Wis. 27, 29, 71 N. W. 814, and cases there cited; *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 3, 79 N. W. 22; *Sladky v. Marinette L. Co.* 107 Wis. 250, 261, 83 N. W. 514. It follows that there was no error in directing a verdict for the defendant.

By the Court.—The judgment of the circuit court is affirmed.

TYLER, Appellant, vs. STITT, Administrator, Respondent.

February 6—February 23, 1906.

Gifts: Promise to make: Enforcement: Parties: Executors and administrators: Trusts: Estoppel: Joinder of causes of action.

1. Actual delivery of the property is essential to the validity of a gift. The delivery as a gift of the promisor's own note is not a delivery of the property, but a mere promise to deliver it, and not enforceable.
2. Plaintiff filed against the estate of defendant's intestate a promissory note signed by the intestate and also by defendant, her husband, as an individual, the note being without any consideration. Plaintiff was not related to the parties to the note, but was brought up in their family. The intestate had theretofore named plaintiff as a beneficiary in a will which was revoked at the same time the note in question was executed and delivered. The defendant at the same time named the plaintiff as a beneficiary in a codicil to his own will, which, with the codicil and note, was delivered to plaintiff. It also appeared that defendant was sole heir at law of his intestate. *Held:*

   (1) The note was a mere promise to make a gift in the future and hence not enforceable against the estate.

(2) The note being filed as a claim against the estate for a debt supposed to be due from it, the defendant was defending in his representative character as administrator only, the estate being the real defendant.

(3) Any trust or estoppel which could be invoked against the defendant in respect to such note affected him only as an individual and not as administrator.

(4) Being sued as administrator in a pure action at law, defendant could not be held as an individual upon an entirely different cause of action in equity.

3. A cause of action to enforce a trust or estoppel against a defendant as an individual cannot be joined with or converted into a cause of action against him as administrator.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is a claim against the estate of Mrs. Olive A. Stitt, deceased, upon an instrument in writing, as follows:

"Milwaukee, Wis., June 18, 1897.

"I promise to pay *Robert D. S. Tyler,* or order, four thousand five hundred dollars, with 6 per cent. interest from this date, payable after my demise, out of my estate.

"OLIVE BLAKE STITT,
"J. S. STITT."

The claim was objected to by *J. S. Stitt,* as administrator of the estate, on the ground that the note was wholly without consideration. The claim was disallowed by the county court, and upon appeal to the circuit court a verdict for the defendant was directed. It appeared upon the trial in the circuit court that the deceased, whose name by virtue of her first marriage was Olive A. Blake, married *James S. Stitt,* the defendant and present administrator of her estate, in the year 1891; that the claimant is a young man not related to either *Mr.* or Mrs. Stitt, but that he was brought up by them in their family and treated as a son; that neither *Mr.* nor Mrs. Stitt had any children of their own; that in 1892 the deceased made her last will, giving one half of her property, amounting to some $9,000, to her husband, *James S. Stitt,*

and divided the remainder into three equal shares, one to the appellant, one to a sister of the deceased, and one to a niece, and further that in case of the death of the niece before the death of the testatrix her share should go to *James S. Stitt,* if he survived the testatrix, otherwise to the appellant; that in December, 1891, *James S. Stitt* made his will, giving all of his property to his wife; that on the 26th of October, 1896, Mrs. Stitt revoked her will, and in June, 1897, the deceased executed the note on which this claim is based and delivered the same to the claimant, and at the same time *James S. Stitt* executed a codicil to his will providing that in case his wife died not surviving him, then all of the property owned by him should go to the claimant, and delivered his original will and the codicil to the claimant; that there was no consideration for the note, and that it was intended simply as a gift by Mrs. Stitt to the claimant; that *James S. Stitt* is the sole heir at law of the deceased. The claimant appeals from a judgment dismissing the action.

For the appellant there was a brief by *McElroy & Eschweiler,* and oral argument by *F. C. Eschweiler.*

For the respondent there was a brief by *Scheiber & Orth,* and oral argument by *C. A. Orth.*

WINSLOW, J. It is very apparent that the appellant has no valid claim against the estate of the deceased. The instrument in question was without consideration. It was but a mere promise to make a gift in the future. A promise to make a gift cannot be enforced. Actual delivery of the property is essential to the validity of a gift, and delivery of the promisor's own note is not delivery of the property, but a mere promise to deliver it. All this is familiar law.

It is claimed that the evidence shows such conduct on the part of the administrator and heir at law as will raise a constructive trust on his part, requiring him to carry out the attempted gift, under the principles laid down in *Brook v.*

Chappell, 34 Wis. 405, or at least that he should now be estopped from asserting that the gift was not valid. We are not called upon now to decide these questions. This is a simple claim against an estate for a debt supposed to be due from the estate. The defendant is defending that claim in his representative character as administrator only. The estate is the real defendant; if there is no debt owing from the estate there can be no recovery. If there be any estoppel or trust which can be invoked against *Mr. Stitt,* it affects him only as an individual and not as administrator. Being sued as administrator in a pure action at law, he cannot be held as an individual upon an entirely different cause of action in equity. The two causes of action could not be joined. *Hawarden v. Y. & L. C. Co.* 111 Wis. 545, 87 N. W. 472. *A fortiori* one cannot be turned into the other.

By the Court.—Judgment affirmed.

EASTERN RAILWAY COMPANY OF MINNESOTA, Respondent, vs. TUTEUR and others, imp., Appellants.

December 14, 1905—March 20, 1906.

Contracts: Effect: Independent contractor or employee? Unilateral contracts: Mutuality: Recitals of bond as affecting contract secured: Appeal and error: Findings of referee, when disturbed: Principal and surety: Prejudicial variation: Payments: Release of surety: Strikes: Referees to hear, try, and determine: Powers: Right to review orders of court: Discovery: Adverse witnesses: Refusal to testify: Striking out complaint: Discretion: Damages on partial performance.

1. In an action on a freight-handling contract between a railway company and P., set out in the opinion, P. is *held* to be an independent contractor and not a mere employee of the railway company.

2. An executory contract in which the promises are all on one side is unilateral and not to be enforced.
3. A freight-handling contract between a railway company, with an established business and dock at a junction point between its line and water navigation, and P., which did not in express words require the railway company to furnish P. any freight to handle, under the situation and circumstances surrounding the parties when the contract was made and the words of the contract, stated in the opinion, is *held* to require the railway company to furnish to P. freight to handle, sufficiently fixed in amount as to render the contract mutual, definite, and certain.
4. In such case P. had given a bond to secure the performance of such contract, which, in referring to the contract, recited that P. had thereby contracted to handle the freight which the railway company "requests him to handle." It appeared from the evidence, however, that there were carriers who brought merchandise to the railway company's dock, and who had the right to handle their own freight, if they so chose. *Held*, that it did not follow from the quoted words that the railway company was not bound to give P. any freight to handle, since it would be necessary for the railway company at times to designate to P. the freight which he was to handle and the freight which was to be handled by the carriers themselves, and that such language referred to such contingency.
5. In an action for damages for the breach of a contract, a finding by the referee before whom the action was tried that certain transactions were an abandonment of the contract and not a partial and mutual settlement between the parties, being supported by ample evidence, will not be disturbed.
6. In an action on a bond securing the performance of a freight-handling contract, under the evidence, stated in the opinion, a finding that contracts for certain work, alleged to be such a modification of the contract as to release the sureties on the bond, were for work outside of the freight-handling contract, will not be disturbed.
7. A contract between a railway company and P., secured by P.'s bond, provided for semi-monthly payments, the moneys earned between the 1st and the 15th of the month to be paid on or about the 20th day of the month, and those earned during the remainder of the month to be paid on or about the 5th of the following month. Under such contract payment was made on the 15th for what had been earned during the preceding half of the month, and on the 16th for what had been earned on the 15th, such payments being made after the railway company knew that P. had violated his contract and when it was doubt-

ful whether he could complete it. *Held*, that such payments were not such a deviation from or violation of the contract that P.'s sureties were thereby discharged.

8. Such provision giving the railway company five days' time in which to make payments was not a provision for the benefit of the sureties, but simply for the convenience of the railway company in auditing.

9. Where money has been earned, the making of payment in advance of the day when it could be legally demanded or sued for is not, as to a surety, a prejudicial variation of the contract, but merely a waiving of a privilege.

10. A contract contained a condition to protect plaintiff from loss by reason of strikes. There was no such condition inserted in the bond securing the performance of such contract, nor any separate bond given, and a claim was made that thereby plaintiff waived the giving of indemnity against loss by strikes. *Held*, that such claim was immaterial where the judgment in favor of plaintiff did not include any sum for damages on that ground.

11. Where a cause was referred to a referee to hear, try, and determine the issues raised by the pleadings, the referee cannot review an order made by the circuit court refusing to dismiss the complaint because of the refusal of plaintiff's attorney to testify as an adverse witness.

12. The power of the court, under sec. 4097, Stats. 1898, to strike out the pleading of an adverse party who refuses to testify under the requirements of sec. 4096 and give judgment as upon default or failure of proof, is discretionary, and will not be reversed except for abuse.

13. On trial of an action to recover for breach of a freight-handling contract between a railway company and P., the referee assessed against the sureties on P.'s bond simply the increased cost of doing the work during the balance of the contract period over and above what it would have cost under the P. contract, deducting payments made to P. and the amount paid for Sunday labor. The referee found that the railway company exercised due care in carrying on the work and paid only the reasonable and necessary cost thereof. *Held*, that the referee applied the right rule in assessing the damages.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The plaintiff is a railroad corporation operating a railroad line from St. Paul, Minnesota, to the city of Superior, and

owning and operating docks and warehouses in the city of Superior for the discharge and storage of freight, as well as the transfer of through freight from its cars to lake carriers, and *vice versa*. On April 20, 1899, it entered into a written contract with the defendant Promberger, by which Promberger agreed to take charge of and operate its docks and warehouses at Superior and handle all freight passing through the same during the navigation season of 1899 for certain rates figured upon a tonnage basis, to be paid him by the plaintiff. On the same date the defendant Promberger as principal, and the remaining defendants and appellants as sureties, gave to the plaintiff a bond in the penal sum of $16,000 to insure the faithful performance of said contract by Promberger. This action is brought upon the bond to recover damages for the alleged breach by Promberger of the freight-handling contract on August 16, 1899. The appellant *Tuteur* and his co-sureties answered, alleging, among other things, by way of defense that the contract in question was not a real but only a simulated contract, and that in fact Promberger was but an employee of the plaintiff; that it was unilateral and contained no consideration or correlative promises on the part of the plaintiff; that it was indefinite and uncertain and not capable of enforcement; that it was released and surrendered by mutual consent August 16, 1899; that, if there was any breach thereof, such breach was the result of a strike of freight handlers, and that the bond did not cover such a breach; that the sureties had been released by a modification of the contract made without their consent and by the making of premature payments thereon to Promberger; that defendants were not liable because Promberger was, to the knowledge of plaintiff's officers, an embezzler before the making of the contract, which fact was concealed by said officers from the appellant; that there could be no recovery, for other reasons not necessary to be now stated.

The action was referred to L. K. Luse, Esq., to hear, try,

and determine. Upon the trial there was no dispute as to the formal execution and delivery of the contract and bond referred to in the complaint. The contract was very lengthy, and the first three paragraphs thereof were as follows:

"(1) This agreement, made and entered into this 20th day of April, A. D. 1899, by and between John Promberger, of the city of Superior, county of Douglas, and state of Wisconsin, party of the first part, and the *Eastern Railway Company of Minnesota,* a corporation organized and existing under the laws of the state of Minnesota, party of the second part, witnesseth:

"(2) That, whereas, the party of the second part owns, controls, and operates docks and warehouses and rail and lake terminals at Superior, Wisconsin, in connection with its line of railroad and the business appertaining thereto; the said docks and warehouses are those usually constructed and operated for the purpose of receiving, forwarding, transferring merchandise, freight, or other property handled by the party of the second part in its business as a common carrier:

"(3) Now, therefore, in consideration of the covenants and agreements hereinafter contained, to be performed by the party of the second part, the said party of the first part agrees to assume charge of and operate the said docks of the party of the second part, under the direction of the party of the second part, or its representatives, in such manner as may best subserve the interests of the party of the second part; and the party of the first part hereby agrees to load or unload *all* cars or vessels and to properly stow *all* the freight, goods, and merchandise arriving at or forwarded from said docks or warehouses of the party of the second part, which the party of the second part may have charge of as common carrier, or own, or in its business of transporting, warehousing, or handling merchandise at the docks or warehouses of the said party of the second part, situated as above described; and the party of the first part agrees to continue such service during the navigation season of 1899, as the said party of the second part, its agents or representatives may direct."

Following these clauses came a number of subsidiary agreements on the part of Promberger, to the effect that the freight was to be loaded or unloaded from cars or vessels into ware-

houses or upon docks, as the plaintiff's agents should direct; that Promberger should furnish all necessary men for the work as the plaintiff should direct from time to time; that Promberger should employ competent and reliable persons to supervise the work under the direction of the plaintiff as to the manner of handling freight; that he would not employ persons objectionable to the plaintiff, and would dismiss any such person upon the plaintiff's request; that he would divide his employees into such gangs as might be necessary to best handle the business or as directed by the plaintiff's agents; that he would handle all gang planks, skids, hoisting machinery, and other appurtenances necessary; that he would perform all labor connected with the operating of the dock, the same as if it was operated by direct employees of the plaintiff, and take care of the docks, warehouses, and other properties, and keep them in good condition; that his men should commence work at 7 o'clock in the morning, and report for duty at any time thereafter as might be necessary for the proper handling of the business and as directed by the plaintiff's agents, it being understood that a regular day gang and a regular night gang should be maintained; that the plaintiff should have the right to employ one or more check clerks or foremen to supervise the handling of freight; that the plaintiff should also have the right to select from Promberger's employees ten or more men for the special work of calling freight and stowing freight; that Promberger should give a good bond in the sum of $16,000, with sureties, conditioned for the faithful performance of the agreement and to protect the plaintiff against any loss from detention of said freight by reason of strikes and from any damage or loss to property by theft, or otherwise, while the same was being handled, and with further conditions not necessary to be stated; that the expenses or liability for damage or loss to freight while being handled should be determined by persons employed by the plaintiff; that in computing tonnage of

freight handled the weights shown by the boat manifests, railroad receipts, or railroad billing should govern; that flour and barrels should be handled on the basis of 200 pounds per barrel, and other freight usually transported by package upon the basis of such weights as were prescribed by the rules of the Chicago board of trade; that in the handling of freight in sacks or frail packages the load to be hoisted out of the hold or into the hold of a vessel should not be such as to damage the package, nor greater than as directed by the plaintiff's agent. The contract further provided that in consideration of the full and faithful performance of the above-mentioned agreements on the part of Promberger the plaintiff agreed to pay Promberger, on or about the 5th and 20th days of each month during the season of navigation (unless the contract should be sooner annulled), certain fixed rates per ton for the freight handled, according to the character of the freight and the necessary handling to be done, which rates it is unnecessary to state in detail; that it would employ a competent and reliable agent to supervise the business, Promberger agreeing to conform to the rules and regulations laid down by said agent; that it would furnish all necessary tow boards, planks, and other appurtenances for the proper handling of the freight; that all employees should have one hour for dinner, one hour for supper, and one hour for midnight lunch; that payments upon the contract were to be based on the freight tonnage handled during the period from the 1st to the 15th, and from the 15th to the last day of each month during the continuance of the contract; that it would furnish all necessary switching service and do all the necessary switching of cars; that it would employ one or more trustworthy watchmen whenever Promberger or his representatives were not present. It was further mutually agreed that, in the event of damage to freight being handled, the same should at once be turned over to the plaintiff to be disposed of and to make settlement with the owner; that, in the event that Promberger

should conduct the business during the season of 1899 in a competent and satisfactory manner, he might, if he chose, "have a contract for the handling of said second party's freight for the year following the termination of this contract, such contract to be substantially in terms the same as this contract;" that as a further consideration to Promberger plaintiff should rent to him a boarding house located near the docks at a nominal rent of $5 for the season, Promberger agreeing to maintain the same in an orderly and respectable manner and to deliver the same over to the plaintiff in good condition at the end of the season; that it was understood between the parties that Promberger should be, in the performance of all his duties, an independent contractor, and subject to the legal duties and liabilities applicable to such contractors. The bond accompanying this agreement, and upon which this action was brought, is in the usual terms of an indemnity bond, in the penal sum of $16,000, is signed by the appellants, and, after the formal parts, reads as follows:

"The condition of this obligation is such that, whereas the above named John Promberger has this day entered into an agreement in writing with the said *Eastern Railway Company of Minnesota,* which said agreement is hereunto annexed, by the terms of which the said John Promberger has contracted to operate the docks and warehouses of the said *Eastern Railway Company of Minnesota,* and to handle, transfer, and stow all freight and merchandise which the said *Eastern Railway Company of Minnesota* requests him to handle, transfer, and stow at the docks of the said *Eastern Railway Company of Minnesota* on cars or upon vessels, in changing business with the said railroad company, in the city of Superior, during the season of navigation of 1899.

"And whereas the said John Promberger has entered into certain covenants and agreements in relation to handling, transferring, and storing said freight and merchandise contained in the said written contract:

"Now, therefore, in case the said John Promberger shall duly and faithfully perform all the covenants and agreements contained in the said agreement on his part to be performed,

and shall save harmless the said *Eastern Railway Company of Minnesota* for all loss or damage by reason of any failure on his part to so perform the covenants and agreements on his part, then this obligation shall be null and void and of no effect, otherwise in full force and operation.

"In witness whereof we have hereunto set our hands and seal the day and year above written.

"J. PROMBERGER.	[Seal.]	Amount.
"HARRIE ROGERS.	[Seal.]	Amt. $4,000
"FRANK H. RUGER.	[Seal.]	Amt. $4,000
"OGDEN H. HAMMOND.	[Seal.]	Amt. $4,000
"H. W. DIETRICH.	[Seal.]	Amt. $500
"MYRON REED.	[Seal.]	Amt. $500
"JOSEPH TUTEUR.	[Seal.]	Amt. $1,500
"JOHN E. GREELEY.	[Seal.]	Amt. $1,500"

The action was tried before the referee and a great volume of evidence introduced, and the referee made the following findings of fact:

"(1) That prior to the execution of the contract between the plaintiff and the defendant John Promberger, on or about April 20, 1899, the plaintiff was the owner of a large terminal warehouse located on the bay front and occupied and used as a terminal facility for its railroad and as a connection between said railroad and the boat lines operating upon the Great Lakes. That it also occupied as lessee an open dock known as the P. & R. dock, where it had been accustomed to receive, for transportation over its lines, steel rails, and that these two docks were the only lake and rail terminal facilities owned or operated by the plaintiff previous to the time of the making of said contract on April 20, 1899, and this was well known to the defendant John Promberger at the time of entering into the contract referred to.

"(2) That the contract dated April 20, 1899, and marked plaintiff's Exhibit 96, was duly executed and delivered by the parties thereto in good faith and for the purposes therein expressed.

"(3) That the bond upon which this suit is brought to recover, and known as plaintiff's Exhibit 95, was duly executed by all of the defendants and delivered to the plaintiff, and so delivered and received in good faith and with intent that it

should become a valid and binding instrument upon all the defendants.

"(4) That the defendant Promberger had operated the docks already mentioned for the navigation season of 1898 under a contract somewhat similar to that of April 20, 1899. That it was well known by him and the plaintiff's officers that the plaintiff's business as a common carrier required it to receive, transport, and unload at the terminal docks mentioned a large amount of freight eastbound. That as the owner and operator of said docks and warehouse it would, in the usual course of business, receive large amounts of freight, including steel rails, from shippers or boat lines operated upon the lakes, and that as a part of plaintiff's business in operating said docks it would naturally, and in the usual course of business, unload from boats the larger part of said freight as a convenient method of operating the docks at the connecting point between its railroad and boat lines. That it was also well known that shippers or boat lines who might insist upon or desire to unload their own freight or cargoes would have the privilege of doing so, and that thereby the amount of freight to be handled under the contract might be somewhat lessened or decreased by the exercise of such privilege or right, and that the parties to the said contract contemplated at the time of entering into said contract that it only covered such freight as the plaintiff, in its business as a common carrier or in the operation of said docks, was called upon to handle, and this without reference to whether it was legally bound to handle the same either by contract or otherwise.

"(5) That the defendant Promberger entered upon the performance of said contract on or about the 20th day of April, 1899, fully performed the same down to the 13th day of August, 1899, and that the plaintiff fully performed said contract upon its part until said contract was abandoned by the defendant Promberger on the afternoon of August 16, 1899.

"(6) That on the 13th day of August, 1899, the employees of the defendant Promberger demanded an increase of wages amounting to about twenty-five per cent., and some of them quit work on that day. That on the 14th day of August, the demand for higher wages not being complied with, others of said employees quit work, and from that time on until the

afternoon of the 16th of August there was almost a complete cessation of work upon the docks. There was plenty of work to do, and during the 13th, 14th, and 15th frequent demands were made upon the defendant Promberger to handle the freight in accordance with his contract, which he failed to comply with and thereby violated his contract both in spirit and in terms. That these several violations of his contract on the 13th, 14th, and 15th of August, 1899, were well known to the plaintiff's local agent in charge of said docks and were also known to plaintiff's division superintendent, George T. Slade, as early as noon of the 14th of August, and that said Slade's office was then in the city of Superior, where said docks are located, and that on the 15th day of August, about noon, said Slade called upon some of the sureties to assist Mr. Promberger in the carrying out of his contract.

"(7) That the cessation of work upon the docks continued until the afternoon of the 16th day of August, at which time a conference was had between the plaintiff's officers; Mr. Hill, the vice-president, Mr. Slade, the superintendent, Mr. Dooley, the local agent, and Mr. Murphy, the attorney, and the defendant Promberger and *Mr. Ruger,* one of the sureties, being also present. That at this conference the defendant Promberger notified the plaintiff of his inability to continue the performance of the contract, and said defendant did then and there wholly abandon said contract. That there was no settlement between the plaintiff and Promberger, and no acceptance of any surrender of the contract, or any release of said Promberger from his obligations under said contract, nor any release of the sureties upon the bond given to secure the performance thereof. That what took place at said conference was contemplated by the plaintiff, and was in fact simply a precautionary measure to determine its right to proceed with the operation of its docks independent of the defendant Promberger, and that no question would be raised as to the plaintiff's right to do so.

"(8) That the plaintiff proceeded at once after the conference of August 16th to organize the force to operate the docks, and doing so acceded at once to the demands of the employees of the defendant Promberger for an advance of wages, which amounted to about twenty-five per cent., and continued to operate the docks by employing the laborers and superin-

tending the work on its own account and without letting out the work to contractors, excepting the loading of the rails on the P. & R. dock, which was let out upon contract to Mudge & Thorgerson, thus carrying on the work until the close of navigation on December 18, 1899.

"(9) That the total cost to the plaintiff in the operation of the docks and in doing the work which the defendant Promberger was required to do under his contract, after his abandonment thereof on the 16th day of August, 1899, until the close of navigation on December 18, 1899, was $58,469.11. That of this sum the plaintiff paid the employees' wages in doing the work at the flour sheds the sum of $56,062.95, paid to laborers engaged on the P. & R. dock $1,264.20, paid to Mudge & Thorgerson, the contractors, $776.96, paid for tools, equipments, etc., $365, making a total of $58,469.11. That some of the labor in carrying out this contract was performed on Sunday, and the wages paid therefor amounted in all to $5,324.74 and the extra cost of such labor was $151.51; the Sunday labor being paid for as overwork to the regular men and the wages increased five cents an hour, which last-named sum I find is not properly chargeable to the defendants, and hence deduct it from the previous cost of operating the docks, leaving the amount of the cost of the operation of the docks $58,317.60. I further find the cost of doing the work under the contract with the defendant Promberger would have amounted to $42,191.07, and that the plaintiff sustained damages by the increased cost of doing the work over and above what it would have cost under the Promberger contract in the sum of $16,126.53.

"(10) That the plaintiff has paid the defendant Promberger for all work done under the contract by him, except the sum of $957.20, which it still holds and claims the right to withhold on account of the damages suffered by it, and that the plaintiff has suffered damages over and above the $957.20 in the sum of $15,169.33.

"(11) That the plaintiff on August 15, 1899, and in the early part of said day, computed and certified the earnings of the defendant Promberger under his contract for the first half of the month of August in the sum of $5,519.42, and thereafter, and about noon of August 15th, by draft issued out of the office of its superintendent, paid said money to said

Promberger, and afterwards, and on August 16th, paid to said Promberger the further sum of $401.90, being a further amount earned under said contract. That at the time of paying the two amounts above mentioned the plaintiff's officers, particularly its local agent, J. P. Dooley, who certified the work, and George T. Slade, its superintendent, knew that the defendant Promberger had repeatedly violated the contract. That the work upon the docks had practically ceased. That the wages demanded by the men were such that it was at least very doubtful whether the defendant Promberger would or could proceed with and complete his contract. That the evidence does not disclose whether the payment of the $5,519.42 on the 15th day of August was prior or subsequent to Mr. Slade calling upon the sureties to aid Mr. Promberger, but I find that the plaintiff was fairly chargeable with notice that Promberger would very likely be unable to perform his contract, and that damages might result to the plaintiff thereby, before the payment of the $5,519.42 on the 15th day of August, 1899.

"(12) That the plaintiff has not since paid the $957.20, being the sum of two bills certified as earned by the defendant Promberger, the sum of $790.80 being certified by audit voucher No. 1655, being defendants' Exhibit C1; and the sum of $166.40, shown by canceled treasury voucher, defendants' Exhibit F1. It did, however, pay to the defendant, on or about August 16, 1899, the sum of $543.55, being the amount shown in treasury voucher No. 346 and draft No. 15, mentioned in the deposition of George T. Slade. That the money so paid was advanced by the plaintiff to said Promberger to pay him for the handling of certain steel rails consigned by steel companies to the Great Northern Railway Company, and was in fact an advancement by the plaintiff for such work on account of the consignor, and would only be repaid to the plaintiff by reason of such advancements, and for this reason the defendants and none of them are injured by such payment, and except as above the plaintiff paid the defendant Promberger no money after August 16, 1899.

"(13) That the plaintiff did not alter or modify its contract with the defendant Promberger, or consent to any modification thereof, and whatever arrangement was made between Mr. Promberger and other parties, particularly the

Davidson Steamship Company to unload the steel rails, was work outside of the Promberger contract, or at least such as he could not require the plaintiff to furnish him.

"(14) That the evidence does not show that the plaintiff participated in the efforts made on the part of A. L. Williams, and some other of its employees, by way of taking assignments of the claims of some of Promberger's former employees of their claim against him, and by garnishment suits endeavoring to obtain a preference over the defendant sureties as to money deposited in the Northwestern National Bank, or as to any money owing by the plaintiff to the defendant Promberger.

"(15) That the plaintiff exercised ordinary and reasonable care taking up and carrying on the work after the abandonment of the contract by the defendant Promberger, and that the amount paid therefor as stated in a previous finding was the reasonable and necessary cost of such work, after deducting the $151.51 which was paid extra by reason of a portion of the work being performed on Sunday.

"(16) That in addition to the damages sustained by the plaintiff by way of the increased cost of doing the work, over and above what it would have cost under the contract, plaintiff sustained some damage by way of detention of its cars for the reason that they were not speedily unloaded, as required by the contract. This damage was in part occasioned by the violation of the contract by the defendant Promberger between August 13, 1899, and the abandonment of his contract on the afternoon of August 16, 1899, and for which counsel for the plaintiff disclaimed upon the trial to recover, and a part because the plaintiff was unable to procure a sufficient number of men at the time it took up the work on August 16th, and also because of a congested condition of the yards. That the amount of damage so suffered was sought to be proven on the trial by showing the number of days for which cars laid idle over and above the usual time for unloading and the earning capacity of the cars for the time they were so detained, and the plaintiff's evidence tends to show that cars were so detained, equal to a single car being held 1,095 days, and that the net earning capacity per car per day was from $5 to $7. I am unable from the evidence to find that the plaintiff sustained the amount of damage thus claimed.

Whether the plaintiff lost the freight it would otherwise have carried, or whether those cars were moved more rapidly as soon as the detention ceased, or whether the plaintiff transported the freight at a little later time, is altogether too problematical. I do find, however, that the cars were detained as claimed to the extent of 1,005 days for a single car, and that a fair rental value per car per day was $3.

"(17) That the plaintiff's officers, prior to the execution and delivery of the bond here sued upon, had information that the defendant Promberger had had some financial troubles, but were not informed that he was guilty, or had been convicted of any criminal charge. That they had a right to believe, and did believe, that he was a capable contractor, and one who was able to perform the contract in question, and they did not notify the other defendants of such information as they had in regard to Mr. Promberger.

"Conclusions of Law.

"As conclusions of law I find and hold:

"(1) That the contract between the plaintiff and the defendant John Promberger was and is a valid, binding contract. That it is not lacking in mutuality, but was intended to apply, and did apply, to all freight which the plaintiff had charge of as a common carrier, or to which it had title, or which came to it to be handled by it in its business as a warehouseman or in the operation of the docks. That the amount of freight to which the contract applied might have varied more or less, depending upon whether the shippers or boat lines insisted upon loading or unloading their own freight, and this may have been to some degree discretionary with the plaintiff; but I hold that it had the right to exercise such discretion. That it was bound to furnish the defendant, under the contract, with the work and pay him therefor, all freight which it had in charge as a common carrier, all of which it owned, and all which came into its hands for handling in its business as operating the warehouse and docks, but this did not necessarily include all freight unloaded upon said docks. I find that there was a consideration for the making of the contract, and that the fact that the amount of freight might vary, even though in the discretion of the plaintiff, did not invalidate or render the contract not binding. I further hold

that the contract, being under seal, imports a consideration, and that the contract would be binding, even though it was discretionary with the plaintiff as to all of the freight how much the defendant Promberger should handle.

"(2) That the bond executed by the defendants on or about April 20, 1899, is a valid and binding instrument. That the defendant Promberger was bound under the contract for all damages which the plaintiff might sustain by reason of any breach on his part, and that the omission to state the amount for which he was bound opposite his signature is of no consequence.

"(3) That the failure of the plaintiff to give notice to the defendant sureties of the information received by its officers as to the defendant Promberger's financial trouble in no way affected the validity of the bond.

"(4) That the payments to the defendant Promberger by the plaintiff on the 15th and 16th days of August, 1899, did not discharge the sureties from liability. That the $5,519.42 on the 15th was made before the full expiration of the time when it was absolutely due and payable, but not before it was earned, and not in violation of any of the terms of the contract. It was only premature in the sense of being paid five days before the plaintiff was obliged to pay it, and being by the terms of the contract payable on or about the 20th, I hold it was not in violation of the terms of the contract to pay this money at the time it was paid.

"(5) The plaintiff did not violate the contract nor were the defendant sureties discharged by the payment to the defendant Promberger by the plaintiff of a draft of $543.55 on August 18th, as this payment was an advancement of money due from other parties.

"(6) That the fact that a part of the work after August 17th was performed by the plaintiff on Sunday does not affect its right to recover damages for breach of contract, except so far as the cost of the work was increased thereby in the sum of $151.51.

"(7) That the payment of $5,519.42 on August 15th and the further payment of $401.90 on August 16th, by the plaintiff to the defendant Promberger after he had repeatedly broken his contract, and such breaches continuing until the final abandonment on the afternoon of August 16th, was un-

warranted and in derogation of the rights of the defendants, other than John Promberger, and that they are entitled to credit of those amounts upon the damages suffered by the plaintiff the same as if such payments had not been made.

"(8) That the defendants, other than John Promberger, are entitled to credit upon the damages suffered by the plaintiff the sum earned by the defendant Promberger under the contract which he has not been paid, being $957.20.

"(9) That the damages suffered by the plaintiff by way of detention of its cars are too remote to be recovered in this action. That the contract in question, in paragraph 14, required the defendant Promberger to give a bond which would, among other things, protect the plaintiff 'against any loss from detention of such freight by reason of strikes and from any damage or loss to property by theft or otherwise.' The bond does not contain this provision, but is general for the performance of the contract by Mr. Promberger. In my opinion the clause quoted was intended to indemnify the plaintiff against loss suffered from the detention of perishable and perhaps other freight and from theft, where claims were made by shippers, and that it had no reference to the detention of cars. I do not think it would be fairly within the contemplation of the parties at the time of the execution of the contract that the plaintiff would be unable to, at some price, obtain help and expeditiously unload its cars in case of the default of Mr. Promberger, and that there is no reason in this case for departing from the general rule that the damages suffered are the difference between the contract price and the actual and reasonable cost of doing the work.

"(10) That the plaintiff is entitled to judgment against the defendant John Promberger in the sum of $16,126.53, with interest at six per cent. from December 18, 1899.

"(11) That the plaintiff is entitled to judgment against the defendants, other than John Promberger, in the aggregate sum of $9,248, with interest from December 18, 1899, to the present time, amounting to $1,853, a total of $11,101, and that judgment be entered in form against the defendant *Harrie Rogers* in the sum of $4,000; the defendant *Frank H. Ruger* in the sum of $4,000; the defendant *Ogden H. Hammond* in the sum of $4,000; the defendant *H. W. Dietrich* in the sum of $500; the defendant *Myron Reed* in the sum of

$500; the defendant *Joseph Tuteur* in the sum of $1,500; and the defendant *John E. Greeley* in the sum of $1,500; but providing therein that all of said judgments shall be satisfied upon the payment or collection thereon of the sum of $11,101, being the aggregate amount due the plaintiff, with interest thereon from the date of said judgment, and that the plaintiff is entitled to judgment against all the defendants for its costs and disbursements in this action."

Many exceptions to the findings of fact were preserved, and the appellants requested counter findings, and also moved the court to set aside the report and re-refer the action, and the plaintiff moved to modify the report and to confirm as modified. These motions were heard at the same time, and the court in all things ratified and confirmed the report and denied all other motions, and ordered judgment against the defendant Promberger for $16,126.53, with interest, and against the appellants severally for the amounts respectively set opposite their signatures to the bond, with costs; and further ordered that all of said judgments, except the judgment for costs, should be satisfied upon payment of the total sum of $11,101, with interest from April 23, 1903, and rendered judgment in accordance with said order. Afterwards, upon motion, the court modified this judgment by providing that the plaintiff should also recover against each of the appellant sureties his proportionate share of the interest on $11,101 from April 23, 1903, to January 10, 1905, and that the judgment against each of the appellants might be satisfied upon payment by him of the amount of the judgment against him, including such proportionate share of the interest, with interest from the date of the judgment and costs; and further providing that all of the judgments against the appellants should be satisfied and discharged when the appellants or any number of them should have paid a sum equal to the sum of $11,101, with interest as aforesaid and costs. From this judgment the sureties upon the bond appeal.

For the appellants there was a brief by *A. B. Ross, John*

Brennan, and *William Ruger,* attorneys, and a reply brief signed also by *William Ruger,* of counsel, and oral argument by *Mr. Brennan* and *Mr. Ruger.*

For the respondent there were briefs by *J. A. Murphy, W. M. Steele,* and *Heber McHugh,* and oral argument by *Mr. Murphy* and *Mr. Steele.*

The following opinion was filed January 9, 1906:

WINSLOW, J. While the contention was made by the appellants that the freight-handling contract in question was merely simulated, or, if not simulated, that its legal effect was to make Promberger merely an employee of the plaintiff, and not an independent contractor, we regard these contentions as being so manifestly untenable that we are not required to discuss them at length, and will simply content ourselves with stating that they are overruled.

The leading questions in the case are whether the contract created the required mutuality of obligation—*i. e.* did it require the plaintiff to furnish Promberger any freight to handle—and whether it was sufficently definite and certain so that damages can be recovered for its breach. An executory contract in which the promises are all on one side is unilateral and not to be enforced. This is familiar law, and if in the present case, by the true construction of the written agreement, Promberger promised to handle freight, but the plaintiff did not either expressly or by implication agree to furnish him any freight to handle, doubtless the agreement would be unilateral. So far as it remained executory it would be an unaccepted offer. So also, if the amount of freight to be handled was neither fixed with reasonable certainty nor ascertainable, there would be no way of measuring the damages suffered with legal certainty, and no court would be required to attempt the task. These principles are quite elementary and do not require elucidation. The question is whether the contract is subject to either of these ob-

jections. The contract certainly does not in express words require the plaintiff to furnish Promberger any freight to handle. Does it do so by necessary implication? In answering this question attention must be paid to the situation and circumstances surrounding the parties when the contract was made. The plaintiff was a railroad corporation operating a railroad between St. Paul and Minneapolis on the one side, and the city of Superior and the Great Lakes on the other. It was, of course, a common carrier transporting large quantities of coal, lumber, flour, and merchandise of all kinds between its termini. It was also a part of the Great Northern Railway system, which system covers a great extent of territory and has its western terminus on the Pacific coast and its eastern terminus at Superior. This system does an extensive business transporting through freight from west to east and from east to west, the same being transferred from cars to lake carriers and from lake carriers to cars at Superior by means of the warehouses and docks of the plaintiff. This transfer business was of great volume, necessitating the employment of from 100 to 350 men, and hence it was essential that the work be systematized and managed with the greatest care and ability, if the railway system was to successfully perform its duties as common carrier. The contract shows that the railroad company, while desiring to retain a sufficient control of the manner of handling and transferring freight at its terminals to insure both care and rapidity in the handling, also desired to place the business in the hands of an independent contractor who would agree to handle the freight at certain definite prices during the entire navigation season. That such an arrangement made with a responsible person was a desirable arrangement is very obvious. It appears that such a contract had been made with Promberger for the handling of freight during the season of 1898 and that it had been satisfactorily performed, and that

for this reason the plaintiff was willing and desirous of making a like arrangement for the season of 1899.

Thus we see that the purpose of the contract was to secure the proper and speedy execution of an absolutely vital part of a very large and well established business, which, if delayed or inefficiently performed even for a day, necessarily involved great loss and damage. Bearing these conditions in mind, and proceeding to examine the words of the contract, we find that the first promise on the part of Promberger is that he will *assume charge of and operate* the plaintiff's docks during the navigation season of 1899, and will load and unload *all cars or vessels* and properly stow *all freight, goods, or merchandise* arriving at or forwarded from said docks or warehouses which the plaintiff may own or have charge of as common carrier in its business of transporting, warehousing, or handling merchandise at said docks or warehouses, under the direction of and as may best subserve the interests of the plaintiff, in consideration of the agreements and covenants on the part of the plaintiff afterwards contained in the contract. After this general promise follow a number of subsidiary promises by Promberger as to the details of the work and the manner of its performance, a number of which provide that such details shall be performed "as directed by the plaintiff or its agents;" also a provision that Promberger shall give a bond to secure the performance of the contract, and then comes the plaintiff's promise that in consideration of the faithful performance of Promberger's aforesaid agreements it will pay him certain fixed rates per ton for freight handled by him which is transferred from cars to vessels or from vessels to cars, and other certain rates per ton for freight simply received and stowed, payments to be made twice a month; and will also furnish Promberger certain necessary conveniences, do necessary switching, furnish a boarding house at a nominal rental and grant to him certain other privileges, and finally that, in case Promberger carries out

his contract satisfactorily, he shall have the right to demand a contract for the handling of the plaintiff's freight for the following year on the same terms.

Rejecting the provisions which relate merely to details, and stripping the contract down to its essence, it consists of a promise by Promberger to do all the freight handling at the plaintiff's warehouses and docks incidental to plaintiff's business at agreed rates, and a correlative promise by the plaintiff to pay those rates for the work at certain intervals. It is true that it is not said in so many words that the plaintiff agrees that it will furnish all its freight to Promberger to handle; but is not that promise a necessary implication? Suppose a merchant makes a written contract with an expressman by which the expressman agrees to do all the cartage of merchandise and parcels incident to the merchant's business for a year at certain specified rates, which rates the merchant agrees to pay; could it be claimed for a moment that the merchant could refuse to allow the expressman to carry any freight, but could treat the contract as a mere offer and employ another to do the work or any part of it without breach of his contract? Would this be an allowable construction of such a contract? We cannot think so. Contracts must be reasonably construed. Conditions or agreements cannot be imported into them, but conditions or agreements necessarily implied are already there. If a man agrees with me to take care of my furnace for a year for a certain sum of money per month, and in consideration thereof I agree to pay him such sum per month, it certainly is not necessary, in order to bind myself, that a clause be added to the effect that I agree to *allow* him to take care of the furnace. Yet such would be the logical result of the appellants' contention. The appellants rely on such cases as *Wells v. M. & St. P. R. Co.* 30 Wis. 605; *Beers v. North Mil. T. S. Co.* 93 Wis. 569, 67 N. W. 936; *Teipel v. Meyer,* 106 Wis. 41, 81 N. W. 982, and *Hoffman v. Maffioli,* 104 Wis. 630,

80 N. W. 1032, as sustaining their position in this case, but examination of those cases shows clearly that they differ essentially from the case at bar, and can hardly be considered as even analogous. In each of them, by the express terms of the contract as construed by the court, only such work was to be done or articles furnished as the other party might desire. In none of them were the amounts fixed by the wants of an established business, but it was left optional with the defendant whether any work should be done or any materials delivered. No such right is reserved either expressly or impliedly by the terms of the contract before us, but, as we have seen, there is a clear implication to the contrary. If anything were needed to demonstrate more clearly the intention of the parties that the contract was to cover all the freight handling incident to the plaintiff's business it would be furnished by that clause of the contract which gives to Promberger the right to demand a renewal of the contract for the next year. That clause guarantees to Promberger in a certain contingency the right to demand another contract for the handling of *said second party's freight* for the year following, to be in substantially the same terms as this contract. The right thus guaranteed to Promberger is not the right to make the same offer or to make a unilateral agreement, but the right to have a contract for the handling of the plaintiff's freight. This provision seems to us to recognize very plainly that the parties deemed the present contract to be a contract giving Promberger the right to handle the plaintiff's freight during the season of 1899. This is apparently a written construction by the parties of the contract; but, further than this, the evidence shows that from the time of the execution of the contract up to the middle of August, when the breach occurred, all the freight handling incident to the plaintiff's business was in fact done by Promberger, and thus the parties by their acts construed the contract in the same way.

Some stress is laid by the appellants upon the fact that the

preamble of the bond on which the action is brought, in referring to the agreement, recites that Promberger had thereby contracted to handle the freight which the plaintiff "requests him to handle," and it is argued that this recital plainly shows that the plaintiff was not bound to give Promberger any freight to handle. While this language is nowhere found in the agreement itself, its presence in the bond doubtless tends in some degree to support appellants' theory. It appears, however, that there were some lake carriers who brought merchandise to the plaintiff's dock who had the right to handle their own freight, if they so chose. Hence it would be necessary for the plaintiff at times to designate to Promberger the freight which he was to handle and the freight which was to be handled by the carriers themselves, and we think that this is the contingency to which the language refers.

Having reached the conclusion that the contract is mutual in its obligations and not unilateral, we shall next consider the question whether it is reasonably definite and certain as to the work to be done. We think this question is very definitely answered in the affirmative by the principles laid down in the case of *McCall Co. v. Icks,* 107 Wis. 232, 83 N. W. 300, and *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 93 N. W. 459. In the latter of these cases this principle is laid down in the opinion by Mr. Justice DODGE:

"In later times courts have fully recognized that when the discretion, wants, or needs of a party are referred to an existing situation, such as an established business or a known enterprise, and intended to be controlled thereby, there becomes added a measure of certainty sufficient to give the contract mutuality." See, also, *W. G. Taylor Co. v. Bannerman,* 120 Wis. 189, 97 N. W. 918.

While the volume of the business necessarily will vary from time to time, still, if the wants of an established business are to regulate the amount of the work to be done or the

goods to be furnished, it is deemed that the measure so fixed is sufficiently definite to satisfy the rule of definiteness and certainty in the terms of a contract. Such was the case here. While the volume of business might vary considerably as compared with previous years, and while some lake carriers had the option whether they would unload their merchandise themselves or require the plaintiff to unload it, still these contingencies were simply a part of the uncertainties surrounding an established business which might vary its gross amount, but which are not held to make such a contract indefinite. If they should be held to make it indefinite, then every executory contract to be measured by the wants of an existing business would be fatally indefinite, because no general business can be entirely free from such uncertainties, however well established it may be. This general question was so fully discussed in the *Messinger Case* that further discussion of it now seems unnecessary.

Appellants further contend that there was a mutual settlement between the plaintiff and Promberger on August 16th, and a partial surrender of the contract, instead of an abandonment thereof by Promberger, as claimed by the plaintiff. This was a question of fact depending on the evidence, and the referee found against the appellants' contention. It is undisputed that the whole trouble which culminated on August 16th resulted from a demand on the part of Promberger's employees for an increase of pay of twenty-five per cent. This demand was made and refused on August 13th, when a number of men quit, and others quit on the 14th, and by the 16th the work on the dock had come to a complete standstill, and the yards and docks became congested with unhandled freight, notwithstanding frequent demands made by the plaintiff on Promberger that he proceed with his contract. In this situation, on the afternoon of the 16th a conference was held between some of the plaintiff's officers and Promberger, at which *Mr. Ruger,* one of the appellant sure-

ties, was present. There is a dispute as to what took place at this conference, most of the witnesses testifying that Promberger stated that he was unable to fulfil his contract and abandoned the same. *Mr. Ruger* claims, however, and other facts are relied on as supporting his version, that there was a settlement then made between Promberger and the plaintiff, and that Promberger was released from his obligations at least so far as warehouse freight was concerned. As before stated, the referee found against this contention, and as he did so upon ample evidence we are unable to disturb his finding. In this connection the appellants' claims that the contract with Promberger was modified, and that premature payments were made to the prejudice of the sureties, may also be considered. The claim of modification is based on the fact that Promberger in May, 1899, with the knowledge and consent of the plaintiff, made a contract with the Davidson Steamship Company for the unloading of a lot of steel rails upon a dock called the P. & R. dock, that the unloading of these rails was included under the terms of Promberger's contract with the plaintiff, and that thus the plaintiff and Promberger practically modified the contract. The evidence bearing on this subject was somewhat voluminous and conflicting, and a rehearsal of it would be of no practical value. The referee found that the work was outside of the contract, or at least such work as Promberger could not require the plaintiff to furnish him, and as this finding has sufficient sup port in the evidence we cannot disturb it.

The contract provided for semi-monthly payments to Prom berger, the moneys earned from the 1st to the 15th of the month to be paid on or about the 20th day of the month, and those earned during the remainder of the month to be paid on or about the 5th of the following month. It appears that on the 15th of August Promberger had earned during the preceding half of the month $5,519.42, and that plaintiff on that day paid him that sum, and on the 16th the further sum

of $401.90 earned on the 15th, and that these payments were made after the plaintiff knew that the contract had been violated and that it was doubtful whether Promberger could complete the contract. Appellants claim that the making of these payments on the 15th instead of the 20th (as was customary) was, under the circumstances, such a deviation from or violation of the contract that the sureties on the bond were thereby discharged, under the doctrine of such cases as *Stephens v. Elver,* 101 Wis. 392, 397, 77 N. W. 737, and *Cowdery v. Hahn,* 105 Wis. 455, 458, 81 N. W. 882. The contention must fail. It is very evident that the provision giving the plaintiff five days' time in which to make the payments was not a provision for the benefit of the sureties, but simply for the convenience of the plaintiff in order to give ample time for auditing. The money had been earned, and the making of the payments in advance of the day when they could have been legally demanded or sued for cannot be considered as a prejudicial variation of the contract, but merely the waiving of a privilege which had been inserted for the convenience of the plaintiff. *Madison v. Am. S. E. Co.* 118 Wis. 480, 95 N. W. 1097.

Several minor contentions may be briefly disposed of. After the abandonment of the contract one Williams, an employee of the plaintiff, purchased a considerable number of claims for wages of the men who had worked for Promberger, to the amount of several thousand dollars, and took assignments thereof, and garnished moneys on deposit to Promberger's credit in a bank and earned by him from certain steamship companies. The appellants claim that the plaintiff participated in this attempt or colluded with Williams therein. This claim was negatived by the referee on sufficient evidence and cannot be disturbed. The same answer must be made to the claim that plaintiff knew that Promberger had been guilty of embezzlement before the bond was given, as well as to the claim that the plaintiff paid the sums of

$957.20 and $166.40 to Promberger at some time after the breach of the contract. Much complaint is made by the appellants in their briefs as to the manner of the trial before the referee, and it is claimed that the referee erred in not making sufficiently effective and sweeping orders requiring the plaintiff to produce its books and vouchers for inspection by the appellants, and in other respects did not give the appellants sufficient latitude in the matter of the examination of the books of the plaintiff and its officers. The trial was very long, and was at several times interrupted for purposes of inspection of books and papers, large quantities of which were produced for inspection. Many of these were at the offices of the plaintiff in St. Paul. Examination of the record indicates to us very clearly that the referee gave the appellants every reasonable facility in the matter of examination of books and papers as well as officers, and we deem it unnecessary to make a detailed statement of the applications and rulings.

It is claimed that because the contract provided that Promberger's bond should be conditioned to protect the plaintiff from loss by detention of freight by reason of strikes, and no such condition was inserted in the bond, nor any separate bond with that provision was given, therefore the plaintiff waived the giving of any bond or indemnity against loss by strikes, and that the loss here sued for and recovered is not covered by the bond sued on. It seems sufficient to say as to this claim that the judgment here does not include a dollar of damage for loss by detention of freight either by reason of strikes or from any other cause. The damages recovered are simply the increased expense of handling the freight above what it would have cost had Promberger carried out his contract. This being the case, the contention becomes immaterial.

It appears that Mr. J. A. Murphy was local attorney for the plaintiff at the time of the employment of Promberger as

well as at the time of the abandonment of the contract, and also has acted as such attorney during this litigation. Prior to the order of reference an attempt was made by appellants to examine him as an adverse witness under the provisions of sec. 4096, Stats. 1898, as amended by ch. 244, Laws of 1901, and, it appearing by preliminary questions and answers that his relations to the plaintiff in this matter were simply those of a local attorney, he declined to answer questions put to him, and the proceedings were dismissed by the commissioner, and a subsequent motion to strike out the complaint on account of Murphy's refusal to testify was denied by the court. After the order of reference was made, the motion to strike out was renewed before the referee and denied by him on the ground that the action was referred to him to hear, try, and determine the issues raised by the pleadings, and that he could not review the order of the court in this regard. This seems an all-sufficient reason for the ruling of the referee, but the question of the correctness of the court's ruling remains. Sec. 4097, Stats. 1898, provides that, if the witness refuse to testify, "he may be punished as for a contempt and his pleading be stricken out and judgment given against him as upon default or failure of proof." Sec. 4096, *supra*, also provides that the officer before whom the examination is held may compel the witness to answer by contempt proceedings. We are not informed why the court refused to strike out the complaint. It is suggested that the court did not consider one who acted simply as attorney to be included within the terms "agent or employee" as used in the statute. However, whatever may have been the reason, it is clearly discretionary with the court, under the statute, whether it will resort to the extreme remedy of striking out the pleadings and ordering judgment, and we are not able to say that there was an abuse of such discretion here.

The question of damages remains to be considered. The referee assessed as damages against the sureties simply the

increased cost of doing the work during the balance of the season over and above what it would have cost under the Promberger contract, deducting the amount of the payments made to Promberger on August 15th and 16th, and the amount paid for Sunday labor. This was clearly the right rule if the plaintiff exercised due care in carrying on the work and paid out only the reasonable and necessary cost thereof, which facts were found by the referee to be true. The method used in ascertaining the amount which it would have cost under the Promberger contract was to figure up from the plaintiff's books of original entry the number of pounds of the various kinds of freight handled at the warehouses and docks during the rest of the season, and to multiply such aggregate amounts by the prices for handling fixed by the contract. Complaint is made that the books used do not furnish accurate or reliable data for ascertaining the total amount of freight so handled, but we find upon examination of the evidence that his objection is untenable and that the results obtained were fairly and reasonably accurate. The case was evidently tried with great care by the referee. His findings of fact are supported by the evidence, and his conclusions of law are justified by his findings of fact and fully support the judgment entered. Many alleged errors have not been specifically treated, but they have been considered and have not been deemed well taken nor necessary to be discussed in detail.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied March 20, 1906.

HUBER, Appellant, vs. MARTIN and others, imp., Respondents.

December 16, 1905—March 20, 1906.

MUTUAL INSURANCE CORPORATIONS. (1–4, 12) *Charter provisions: Memberships: Commencement and termination: Rights, remedies, and interest of policy-holders.* (5–7, 9–11, 13) *Title to corporate property: Equitable interests in corporate property: Rates for insurance: Assets: Surplus: Accumulation: Distribution: Charter: Amendment.* (10, 11, 14) *Constitutional law.* (12, 16) *Equity: Actions by members: Refusal of officers to act.* (14–17) *Statutes: Construction: Partial unconstitutionality.* (15–17) *Corporate existence:* De facto *corporations: Action to test validity of incorporation: Form: Parties.* (17) *Re-organization of corporations.*

A mutual insurance corporation having a charter provision to the effect that a membership therein could only be created by accepting from it a policy of insurance and continue only till the end of the policy period, did business for a considerable period of time, accumulating a large surplus. A law was then enacted authorizing a re-incorporation under the general law for the creation of insurance corporations, with the consent of two thirds of existing policy-holders representing at least one half the outstanding insurance, the re-organized concern to be the owner of the property of the superseded company for its use in the conduct of its business. The act provided that any existing policy-holder of such a mutual company, in case of its being superseded, should be entitled at his option to take stock in the new company to the extent of such part of the total stock as the amount paid by him on his policy bore to the total amount of risks in force, or to receive such proportion of the surplus as the company's actuary might deem equitable, that being coupled with a provision that all the property of the superseded company should become that of the new concern, as aforesaid, no part to be divided among the members thereof. The legislative basis of re-organization, in form, contemplated the possibility of members of the superseded company at a specified time, in the aggregate, securing a small percentage only of the stock in the new concern or of the surplus aforesaid, and of existing and past policy-holders of the mutual company, in the aggregate, obtaining not to exceed one third of such surplus or stock. A re-organization occurred in form under such law as to the corporation in question, plaintiff and others not consenting.

1. Under the charter of a mutual insurance company providing, in effect, that one can become a member only by taking out a policy of insurance and that the membership can survive only to the end of the policy period upon which it is based, no one can rightly be treated as a member for any purpose at any time unless he then holds an unexpired policy of insurance.
2. If the charter of a mutual insurance company contains no provision on the subject, membership commences only with the taking out of a policy and lasts only for the policy period.
3. As regards rights and remedies, the policy-holders in a mutual insurance company are stockholders therein the same as owners of stock in a stock corporation, there being no charter provision to the contrary.
4. The interests of policy-holders in a mutual insurance company are twofold, they are both insurers and insured. In respect to the former they are entitled to share in the losses and profits of the business on the basis of a partnership, except so far as the charter or policy contract provides otherwise.
5. The title to the property of a mutual insurance corporation is in the company, but the equitable interests therein are vested in the members the same as in case of a stock corporation. While the corporation owns the property the members own the corporation.
6. It is competent for a mutual insurance corporation, there being no limitation in its charter to the contrary, to make rates for insurance with a view of probably creating a surplus and of subsequently distributing the same to members so far as experience shall show that the same is not needed in the business.
7. In case of a distribution of the surplus of a mutual insurance company or of its other assets, there being no charter provision to the contrary, existing policy-holders and such only are the legitimate distributees. In the aggregate, they are entitled to the whole.
8. The legislature may alter or amend the charter of a corporation but cannot legitimately appropriate its property without the consent of all of its members, either to its own use or that of a private party, though such party be a successor corporation, in the absence of some authorization to the contrary in the charter originally.
9. For all except corporate purposes, the property of a mutual insurance company, the same as that of any other corporation, belongs to its members whether they are stockholders in the technical sense or in the broader one which includes policy-holders in such a company.

10. The property of a mutual insurance company and the equitable property rights of its members are within the guarantees of the state constitution as regards the inhibition against laws impairing the obligation of contracts, and the inhibition of the national constitution as regards the equal protection of the laws and deprivation of property without due process of law.
11. A law enacted during the life of a mutual insurance company providing for the distribution of its assets or a bestowal thereof upon another without consent of all of its members, no authority in that regard being contained in the charter of such company, offends against the constitutional limitations referred to.
12. Any member of a mutual insurance company suing for himself and others similarly interested, may invoke equity jurisdiction to redress or prevent any wrong injuriously affecting the property rights of the corporation, when its officers will not move appropriately to that end.
13. The supposed common-law rule, that upon the termination of a corporation its debts become extinguished, its realty reverts to the grantors and its personal property goes to the sovereign, if it ever existed in fact, is wholly obsolete, except as to purely public corporations.
14. In case of a scheme of legislation for a particular purpose, created by the enactment of a law specially referring to the subject, and to other laws required for a complete plan, if the special enactment is the inducing provision and is unconstitutional, the whole is inefficient. The matter is governed by the rule, that where a part of a law is unconstitutional and was the inducement to the rest, which by itself would not have been enacted, the whole is void.
15. An unconstitutional act of the legislature is not a sufficient basis for a corporation *de facto*. That can exist only in case of a law under which it might have been created *de jure*.
16. The law that corporate existence cannot be inquired into, except by judicial proceedings in the name of the state, does not apply to a pretended but not even a *de facto* corporation.
17. In case of success, in form, of an attempt to re-organize a mutual insurance company on the stock plan under a law, in terms, authorizing it and the insurance business formerly carried on by the old company being continued ostensibly by the new creation, using the former's assets and good will, if the attempt is fruitless because of the enabling act being void such continued business is to be regarded as really that of the old corporation; as belonging to it.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Washington county: JAMES J. DICK, Circuit Judge. *Reversed.*

Appeal from an order sustaining demurrers to the complaint. The facts relied upon for a cause of action were these: The defendant Germantown Farmers' Mutual Insurance Company is a corporation created and existing under ch. 278 of the Laws of Wisconsin for the year 1854, and the defendant Germantown Insurance Company is a corporation existing under ch. 89, Stats. 1898, and ch. 229 of the Laws of Wisconsin for the year 1903.. The individual defendants are the officers and directors of the two corporations. Plaintiff is a policy-holder of the first-named company, holding policy No. 67,198, dated August 1, 1901, and expiring by its terms August 1, 1906, and by the law of 1854 mentioned he became a member thereof. Such company has, or did have before they were dissipated, as hereafter stated, assets in excess of $211,375.76, which are really the property of its members. September 28, 1903, the individual defendants and others wrongfully conspired together and organized the Germantown Insurance Company, to the end that it might acquire the assets of the Germantown Farmers' Mutual Insurance Company for the use and benefit of the former and the members of such conspiracy without the consent of the policy-holder members of the old organization, and the purpose of such conspiracy was accomplished, so far as creating the new organization and putting its members in possession of such property. Such new organization has paid a small part of the assets wrongfully acquired to members of the old company. Nearly all the stock of the new organization has been taken by the officers and directors of the old company, they thereby wrongfully acquiring to themselves the large property aforesaid, which belonged to the old organization and its members, leaving said members no security for payment of their policies, except that assumed by the new organization. Plaintiff has been denied access to the books of

the new organization, on which account he is unable to state precisely the amount of unlawful gains which it secured by the wrongful acts aforesaid. This action is prosecuted on the behalf of plaintiff and all others similarly situated for the benefit of the Germantown Farmers' Mutual Insurance Company, such company being made a defendant because its officers are the persons guilty of the mischief complained of, and insist that the new organization has absorbed the old one, leaving the latter incapacitated to maintain any action.

Upon such facts plaintiff prayed for an accounting by the Germantown Insurance Company and the individual defendants as to all their doings in the premises, and for restraint upon them as to appropriating the good will of the Germantown Farmers' Mutual Insurance Company, or disposing of or injuring its assets, and for a receiver to take over the assets involved in the administration, and for general relief.

Separate demurrers were interposed to the complaint, first, for want of jurisdiction over the defendants or the subject of the action; second, for want of legal capacity to sue, in that plaintiff has no legal right to call in question the power of the defendant corporations or their officers to do any of the things mentioned in the complaint, and has no interest in the subject matter of the action; third, for misjoinder of causes of action; fourth, for insufficiency. The demurrers were sustained and plaintiff appealed.

For the appellant there was a brief by *Lewis & Roach,* attorneys, and *Quarles, Spence & Quarles,* of counsel, and oral argument by *T. W. Spence.* They contended, *inter alia,* that the plaintiff in the action had legal capacity to sue. Secs. 3, 14, ch. 278, P. & L. Laws of 1854; sec. 1, ch. 215, Laws of 1870; *Schimpf v. Lehigh Valley Mut. Ins. Co.* 86 Pa. St. 376; *Mygatt v. Protection Ins. Co.* 21 N. Y. 52, 70; *Strong v. Harvey,* 3 Bing. 304; *White v. Haight,* 16 N. Y. 310, 318; *Lawrence v. Nelson,* 4 Bosw. 240; *Smith v. Hunterdon Mut. F. Ins. Co.* 41 N. J. Eq. 473; *Carlton v. Southern Mut. Ins.*

Co. 72 Ga. 371; *Schwarzwaelder v. German Mut. F. Ins. Co.* 59 N. J. Eq. 589; *Dousman v. Wis. & L. S. M. & S. Co.* 40 Wis. 418; *Doud v. Wis., P. & S. R. Co.* 65 Wis. 108. Ch. 229, Laws of 1903, is unconstitutional. Secs. 10, 12, art. I, Const. of Wis.; sec. 1, XIVth Amend. U. S. Const.; *Emerson v. Nash,* 124 Wis. 369, 102 N. W. 921; *Grobe v. Erie Co. Mut. Ins. Co.* 24 N, Y. Misc. 462; *Schwarzwaelder v. German Mut. F. Ins. Co.* 59 N. J. Eq. 589; *Luther v. C. J. Luther Co.* 118 Wis. 112.

For the respondents there was a brief by *Sawyer & Sawyer* and *S. S. Barney,* and oral argument by *Mr. N. W. Sawyer* and *Mr. Barney.* They contended, *inter alia,* that the assets or property of a corporation belongs to the corporation as a legal entity and not to the members. *Bent v. Hart,* 10 Mo. App. 143; *Spurlock v. Missouri P. R. Co.* 90 Mo. 199; *Mickles v. Rochester City Bank,* 11 Paige, 118. The word "mutual," as applied to fire insurance companies, has a very uncertain meaning. Under some charters there is a mutuality as to liability for losses and expenses, as to liability in the right to participate in the profits, if there be such, and mutuality in the right to vote, the number of votes being regulated by the amount of insurance. *Schimpf v. Lehigh Valley Mut. Ins. Co.* 86 Pa. St. 376; *Carlton v. Southern Mut. Ins. Co.* 72 Ga. 371; *Mygatt v. Protection Ins. Co.* 21 N. Y. 52, 70; *White v. Haight,* 16 N. Y. 310, 318; *Schwarzwaelder v. German Mut. F. Ins. Co.* 59 N. J. Eq. 589. The rights and liabilities of policy-holders are limited by the provisions of their contracts and the law which controls the organization of the company, and the plaintiff can assert no right not so given. *Dewey v. Davis,* 82 Wis. 500; *Grobe v. Erie Co. Mut. Ins. Co.* 53 N. Y. Supp. 628; *S. C.* 57 N. Y. Supp. 290; *S. C.* 169 N. Y. 613; *Uhlman v. N. Y. Life Ins. Co.* 109 N. Y. 421, 429; *Block v. Valley Mut. Ins. Asso.* 52 Ark. 201, 20 Am. St. Rep. 166; *Carlton v. Southern Mut. Ins. Co.* 72 Ga. 371. It is no part of the purpose of mutual fire

insurance companies to distribute a surplus among their members, and the members, when insuring, understand that to be the case. *Kennan v. Rundle,* 81 Wis. 212, 222; *Grobe v. Erie Co. Mut. Ins. Co.* 53 N. Y. Supp. 628; *White v. Haight,* 16 N. Y. 310, 318. The fact that mutual companies are somewhat of the nature of partnerships does not entitle the members thereof to share in the profits of the company. *Allen v. Winne,* 15 Wis. 113; *Dewey v. Davis,* 82 Wis. 500; *Uhlman v. N. Y. Life Ins. Co.* 109 N. Y. 421; *Grobe v. Erie Co. Mut. Ins. Co.* 57 N. Y. Supp. 290; *Alvord v. Barker,* 107 Iowa, 143, 77 N. W. 868; *Cohen v. New York Mut. L. Ins. Co.* 50 N. Y. 610, 623, 624; *People v. Security L. Ins. & A. Co.* 78 N. Y. 114; *Block v. Valley Mut. Ins. Asso.* 52 Ark. 201; *Titcomb v. Kennebunk Mut. Ins. Co.* 79 Me. 315, 9 Atl. 730, 732. The plaintiff, by the allegations of the complaint, admits that the mutual company has been re-organized into and is the defendant's stock corporation, by which it also admits that everything that was required to be done to accomplish that object was in fact done. Such being the case, it follows that the assets and liabilities of the mutual company are now the assets and liabilities of the stock company except as otherwise provided in ch. 229, Laws of 1903. *Knight v. Ashland,* 61 Wis. 233; *Nat. F. & P. Works v. Oconto City W. S. Co.* 105 Wis. 48, 53; *Mayfield v. Alton R., G. & E. Co.* 100 Ill. App. 614; *Manhattan F. Ins. Co. v. Fox,* 77 N. Y. Supp. 657, 660; *Barry v. Kansas City, Ft. S. & M. R. Co.* 52 Kan. 759, 776; *Brum v. Merchants' Mut. Ins. Co.* 16 Fed. 140; *Houston & T. C. R. Co. v. Shirley,* 54 Tex. 125; *Morrison v. Am. Snuff Co.* 79 Miss. 330. The complaint does not state a cause of action in equity upon its face. *Johnson v. Phenix Ins. Co.* 66 Wis. 50; *Hughes v. Hunner,* 91 Wis. 116; *Cannon v. Home Ins. Co.* 53 Wis. 585; *Lenz v. C. & N. W. R. Co.* 111 Wis. 198; *Schneider v. Menasha,* 118 Wis. 298; *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211; *John V. Farwell Co. v. Wolf,* 96 Wis. 10;

Allen v. Winne, 15 Wis. 113, 118; *McElroy v. Minnesota P. H. Co.* 96 Wis. 317; *Alvord v. Barker,* 107 Iowa, 143; *Denver F. Ins. Co. v. McClelland,* 9 Colo. 11; *Hinckley v. Pfister,* 83 Wis. 64, 84; *Brown v. Duluth, M. & M. R. Co.* 53 Fed. 889; *Huntington v. Savings Bank,* 96 U. S. 388; *Alton R., G. & E. Co. v. Mayfield,* 95 Ill. App. 146; *People v. Security L. Ins. & Annuity Co.* 78 N. Y. 114, 122; *Dewey v. Davis,* 82 Wis. 500; *Davis v. Shearer,* 90 Wis. 250; *Gillman v. Druse,* 111 Wis. 400, 411; *Spalding v. North Milwaukee T. S. Co.* 106 Wis. 481, 489; *Milwaukee C. S. Co. v. Dexter,* 99 Wis. 214, 226; *Whitehill v. Jacobs,* 75 Wis. 474; *First Ave. L. Co. v. Parker,* 111 Wis. 1, 9; *Grobe v. Erie Co. Mut. Ins. Co.* 53 N. Y. Supp. 628; *Trisconi v. Winship,* 26 Am. St. Rep. 175–178. The complaint should be dismissed for laches and want of equity. *Holden v. Meadows,* 31 Wis. 284, 291; *Butler v. Mullen,* 100 Mass. 453; *Eustis v. Bolles,* 146 Mass. 413; *Melms v. Pabst B. Co.* 93 Wis. 174; *Sterns v. Page,* 7 How. 819, 829; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392; *Van Beck v. Milbrath,* 118 Wis. 42, 46; *Bong v. Parmentier,* 87 Wis. 129; *Fuller v. Melrose,* 1 Allen, 166; *Newcomb v. Reed,* 12 Allen, 362; *Covington & L. T. R. Co. v. Sandford,* 164 U. S. 578; *Beckman v. Consolidated T. Co.* 114 Fed. 232, 254; *Dannemeyer v. Coleman,* 11 Fed. 97; *Tanner v. Lindel R. Co.* 180 Mo. 1, 79 S. W. 155; *Zabriskie v. Cleveland, C. & C. R. Co.* 23 How. 381, 401; *Kent v. Quicksilver M. Co.* 78 N. Y. 159; *Martin v. Pensacola & G. R. R. Co.* 8 Fla. 370, 73 Am. Dec. 713; *State ex rel. Columbus v. Mitchell,* 31 Ohio St. 592; *Tash v. Adam,* 10 Cush. 252; *Lauman v. Lebanon Valley R. Co.* 30 Pa. St. 42; *Duke of Leeds v. Amherst,* 2 Phill. Ch. 117, 123; *Luther v. C. J. Luther Co.* 118 Wis. 112, 125; *Schwarzwaelder v. German Mut. F. Ins. Co.* 59 N. J. Eq. 589; *Strong v. McCagg,* 55 Wis. 624; *Michelson v. Pierce,* 107 Wis. 85; *Stein v. Benedict,* 83 Wis. 603; *Uhlman v. N. Y. Life Ins. Co.* 109 N. Y. 421. Ch. 229, Laws of 1903, is a valid enactment.

Bent v. Hart, 10 Mo. App. 143; *Spurlock v. Hart,* 90 Mo. 199; *Mickles v. Rochester City Bank,* 11 Paige, 118; *Uhlman v. N. Y. Life Ins. Co.* 109 N. Y. 421; *People v. Security L. Ins. & A. Co.* 78 N. Y. 116; *Grobe v. Erie Co. Mut. Ins. Co.* 53 N. Y. Supp. 628; *S. C.* 57 N. Y. Supp. 290; *S. C.* 169 N. Y. 613; *State Bank v. State,* 1 Blackf. 267; *Att'y Gen. v. Gower,* 9 Mod. 224; *Titcomb v. Kennebunk Mut. Ins. Co.* 79 Me. 315, 9 Atl. 730; *Bank of Miss. v. Duncan,* 56 Miss. 166; *Acklin v. Paschal,* 48 Tex. 147; *Smith v. Hunterdon Mut. F. Ins. Co.* 41 N. J. Eq. 473; *Mason v. Ashland,* 98 Wis. 540, 545; *Nat. F. & P. Works v. Oconto City W. S. Co.* 105 Wis. 48, 53; *Schwarzwaelder v. German Mut. Ins. Co.* 59 N. J. Eq. 589. In order to entitle a person to challenge an act of the legislature as unconstitutional and, therefore, invalid, he should be required to show that some substantial right was violated or infringed. The fact that he may be able to spell out some contractual right should be held insufficient if such right be manifestly valueless and of no benefit to him. The test as to whether a contract has been impaired is whether the value has been diminished. A contract made subject to an amendment is not impaired by such amendment. *West Wis. R. Co. v. Supervisors,* 35 Wis. 257, 272; *Oshkosh W. W. Co. v. Oshkosh,* 109 Wis. 208, 215; *Peninsular L. & C. Works v. Union O. & P. Co.* 100 Wis. 488, 491; *Second Ward Sav. Bank v. Schranck,* 97 Wis. 250, 262; *Grobe v. Erie Co. Mut. Ins. Co.* 53 N. Y. Supp. 628; *S. C.* 57 N. Y. Supp. 290; *S. C.* 169 N. Y. 613; *Wright v. Minnesota Mut. L. Ins. Co.* 193 U. S. 657; *Spring Valley W. W. Co. v. Schottler,* 110 U. S. 347; *Shields v. Ohio,* 95 U. S. 319; *Green v. Biddle,* 8 Wheat. 1; *Nugent v. Supervisors,* 19 Wall. 241–251; *Buffalo & N. Y. C. R. Co. v. Dudley,* 14 N. Y. 336; *Hale v. Cheshire R. Co.* 161 Mass. 443; *Bishop v. Brainerd,* 28 Conn. 289; *Pennsylvania College Cases,* 13 Wall. 190; *Bailey v. Hollister,* 26 N. Y. 112; *Stewart v. Erie & Western Transp. Co.* 17 Minn.

372; *Supreme Lodge Knights of Pythias v. Knight,* 117 Ind. 489.

The following opinion was filed January 30, 1906:

MARSHALL, J. Counsel for the respective parties, as we view the complaint, in effect, take issue as to their rights on this state of facts: A purely mutual company was organized under a charter providing that policy-holders only should be members thereof. It conducted its business for some fifty years. In that time it accumulated a surplus of over $200,000. At the time of the commencement of the action and during the re-organization acts hereafter mentioned, plaintiff was a member of the company. The entire membership at the time of such proceedings constituted but a small proportion of those who had joined the company from the beginning. The legislature, after the surplus was substantially as indicated, enacted a law in terms authorizing such a company to be turned into a stock corporation at the option of two thirds of its existing policy-holders representing not less than one half of its outstanding insurance. It did not recognize such policy-holders as having any greater several interests in the corporate property, or rights to participate in the taking of stock in the re-organized company, than past policy-holders, or treat them as being the owners of the corporate property and business, or having any interest therein worthy of being sought after in the re-organization proceedings, or as a result thereof, or policy-holders, past and present, as having, in the aggregate, rights in such property equivalent to but a small proportion of the whole thereof, or of a character reasonably probable to be realized upon. The scheme in its entirety was such that its execution in any case would probably or necessarily result in bestowing the net assets over liabilities of the company upon the new organization, and indirectly upon the promoters thereof as a mere gratuity. The officers of the Germantown Farmers'

Mutual Insurance Company became the promoters of the Germantown Insurance Company, as a re-organization of the former, for the purpose of enabling the new creation to acquire directly, and themselves to acquire indirectly, without consideration, the surplus assets of the old company. They fully executed such purpose as regards acquiring actual possession of such property and using the same as that of the new company. The plaintiff and others similarly situated did not consent thereto.

Counsel for respondents by their attitude in printed and oral arguments accepted the situation stated, affirming that the conduct complained of is justifiable on principle and authority, that it is neither a wrong to appellant or to anyone else, of sufficient dignity at least to be a subject for judicial redress at his suit or that of any other party; that it is not even one of those wrongs from the standpoint of good morals, laying one liable to the condemnation of his fellow-men; and that, if it were otherwise as an original proposition, it is not a wrong under the circumstances by force of legislative authorization within its legitimate field. Counsel for appellant as confidently assert the negative, maintaining that the acts of the legislature involved, and to which respondents point for their justification, is a clear usurpation,—is within the condemnation of the letter and spirit of the constitution, state and national, and of elementary and judicial authority as well.

The very statement of the position which must be maintained in order to defeat the complaint as insufficient to show any wrongdoing as regards the appellant of which he can be judicially heard to complain in the manner attempted, or at all, at first sight, we must confess, so shocks the moral sense that one is inclined to enter upon a study of the subject with the impression that no substantial basis can be found for it in the law. As a rule, one can rightly acquire property only by gift *inter partes* or operation of law, or by finding or le-

gitimate reduction to possession of things belonging to the people in the sovereign capacity, or by estoppel or by adverse possession, or by creating it by one's own energy, or that in connection with his private capital, or such and the capital of others legitimately secured, or by purchase. To obtain property in any other way one must needs pass beyond the boundary line between right and wrong, measured by legal standards. It is quite probable that there have been many excursions beyond that line, and many more beyond the line dividing right from wrong, tested by purely moral standards, in the administration of insurance trusts of different sorts,—some of the kind involved here and some having the stock feature of ownership,—the officers, or those connected with them, with their connivance or consent, or both, in various ways depleting the trust fund or using it for their private enrichment as never contemplated by the policy-holders, or the organic acts of the corporate creation. Such occurrences, whether viewed in their moral or legal aspects, as regards facility for transferring trust property to the private use of its chosen guardians, pale before the possible happenings, if the stated case must be stamped with judicial approval. In that contingency nothing stands in the way but the uncertain will of the legislature, of the officers of our great mutual life insurance company, if they should be so inclined, so manipulating things as in time to reduce to their private ownership the great wealth constituting its surplus fund, and reducing to like ownership the good will of the insurance business itself, which has been built up by wise management and the patronage of the people through a period of more than half a century. The very thought that such a result would be possible if the law is as contended for by respondents' counsel, suggests the existence of such serious infirmity in our constitutional guarantees as regards property rights that one could not well conclude that they exist, except in the face of some unmistakable demonstration.

To give added emphasis to what has been said we will turn to ch. 229, Laws of 1903, under which respondents justify, showing that the result of executing the law in the case in question would produce all the dire results to the parties in interest above suggested.

The company was organized in 1854. It had done business for forty-eight years at the time of the acts complained of. At the end of such period, as appears by the last public record, the amount of unexpired risks was $2,922,889. The amount paid for carrying such risks was $42,331.32. The length of the policy periods was about as follows: one fourth one year, one half two years, and one fourth five years. The total amount of premium assessments paid into the company's treasury from its organization was $896,558.64. Assuming that the average rate for carrying risks for the entire period of the company's existence was substantially the same as for the last five years thereof the total amount of risks from the beginning was approximately $63,334,000, indicating that at the time of the attempted re-organization the number of policy-holders and the amount of risks then in force was to the total number of persons who became members of the company from the start, and the total amount of risks carried during the entire period, as one to twenty-two. The re-organization act provided as follows:

"Sec. 1. Any mutual fire insurance corporation, organized under any law of this state" circumstanced as the one in question "may, with the consent in writing of two thirds ($\frac{2}{3}$) of the members of such corporation representing not less than one half of its outstanding insurance, become a stock corporation, by proceeding in accordance with the provisions of the statutes of this state regulating the organization of stock fire insurance corporations.

"Sec. 2. Every member of such corporation on the date of said annual or special meeting shall be entitled to priority in subscribing to the capital stock of such corporation, for one month after the opening of the books of subscription, and in the proportion that the amount of cash premium paid in by

such member bears to the total amount of risks in force on the date of said annual or special meeting; provided, that if any one of the past or present members shall not subscribe for stock, then the said corporation shall, upon application, within ninety (90) days return to him his equitable proportion of the surplus of the company, to be computed by an actuary to be employed by the corporation for that purpose.

"Sec. 3. No part of the assets of such mutual fire insurance corporation shall be divided among the members thereof, but shall, after such re-incorporation, become the property of such stock corporation, to be expended by it for the ordinary disbursements of the company, in carrying on its business, including the payment of losses incurred upon its policies; and all property of such mutual fire insurance corporation shall be transferred to such stock corporation, organized as aforesaid, in the manner provided by law."

It will be observed that one month only was allowed after the opening of the books for subscriptions for stock in the new corporation for members of the old company to become subscribers. That contemplated that all persons who had become members of the company during the forty-eight years of its existence, and who were living, and the personal representatives or the heirs wherever they might be, of those who were dead, should exercise the right afforded by the act to take stock in the corporation within the thirty days named. No provision, however, was made for any notice to the possible beneficiaries of the opening of such books, nor as to the amount of capital stock of the new corporation. All that was left to the custodians of the property and business of the old concern, who presumably were to be, and who in fact became, the promoters of the new organization. The complaint does not state what amount of stock was finally determined upon for the new organization. It could not have been less than $100,000, for that is the minimum fixed by the statute. It is safe to assume, probably, that it was fixed at that sum. So it appears by computation that every one of the existing policy-holders was afforded the opportunity, if he should de-

sire and discovered his rights in time, to take stock to the amount, approximately, of fifty cents for each $1,000 of insurance carried. The rate would be substantially the same as applied to all persons who became policy-holders from the beginning. If all the existing policy-holders improved the very uncertain and wholly valueless opportunity to take stock, it would exhaust about $1,500 thereof. If all those possessing membership rights at any time during the existence of the company improved the opportunity afforded by the act to take stock, it would exhaust about $31,667 thereof, or somewhat less than one third. Thus it will be seen that the promoters of the enterprise and, in contemplation of law, the members of the legislature in passing the act must have proposed from the start the appropriation for the use of such promoters of all the assets of the old company, alleged in the complaint to amount to some $250,000, and $211,375.76 in excess of all liabilities, actual and contingent, since the amount above secured to each policy-holder was too trifling to be called for.

The act treated, as before indicated, every one as having a membership right who at any time held a policy in the corporation and entitled to the same consideration as any other member. Provision was made, in form, to enable each one having any such right to claim a part of the surplus, in case of his failing to take advantage of the valueless opportunity indicated, to take stock, but such provision was likewise valueless as will be seen. As a condition of any past or present member obtaining any part of the surplus he was required to be vigilant and make application therefor, and then to take such sum for his appropriate share as the company's actuary might deem equitable. Obviously, if the legislative basis for subscription rights of members were taken as the equitable standard for measuring rights to the surplus, the amount coming to each member would not be worth the trouble required to obtain it. It must be presumed that the legislature

intended to preserve to those desiring to become members of the new organization their equitable rights in that regard according to its views in respect thereto. In that light no reason is perceived why, if the company's actuary saw fit to use such standard, it would not be justified, if the act of the legislature is valid. In any event, since past as well as present members are required to be considered, only about one twenty-second, or $9,545, of the surplus could be awarded to present members, if the entire surplus were to be considered as a fund for distribution among members, past and present. That would afford about thirty-one cents per $1,000 of risk carried by the company. Thus, it will be seen, it would be a reflection upon every one concerned in passing the act in question and executing it, to entertain the idea that they seriously thought the result of administering it to the company in question would be otherwise than a bestowal upon the new corporation of the legal title, and upon the managing agents of the old company,—the custodians of its property,—who would naturally, and did actually, become the organizers of such corporation, the equitable ownership of all property and business of the old company as a mere gratuity.

If what has been said needs reinforcement sec. 3 of the act furnishes it. That is sufficiently significant to bear repeating at this point:

"No part of the assets of such mutual fire insurance corporation shall be divided among the members thereof, but shall, after such re-incorporation, become the property of such stock corporation, to be expended by it for the ordinary disbursements of the company in carrying on its business, including the payments of losses incurred upon its policies."

How could all the property of the old organization become that of the new one, *"to be expended by it for its ordinary expenses,"* no part being divided among the members of the old organization, and yet such members obtain their equal proportion under the second section of the act? The only

conclusion reachable, it seems, is that the author of the legislation did not give any thought to the subject of the second section as to its requiring any efficient distribution of the surplus. It could not be distributed as property of the old organization and at the same time be covered into the treasury of the new one for its ordinary disbursements in payment of its debts, expenses, and policies. So it is plain, not only from the spirit but the letter of the act, that the purpose thereof was to make a gift of the property of the old organization to the new one, the same being regarded as disposable at the will of the legislature.

In respect to the peculiar features before referred to there is no similar law anywhere, so far as we are able to discover. Counsel for respondent place great reliance on *Grobe v. Erie Co. Mut. Ins. Co.* 24 Misc. 462, 53 N. Y. Supp. 628, affirmed 39 App. Div. 183, 57 N. Y. Supp. 290, which will be discussed at some length hereafter. As suggested by counsel for appellant, the law there, quite unlike the one before us, dealt with existing members of the old organization as, in the aggregate, the equitable owners of its assets and entitled to become the owners of all of the stock of the new corporation. The total amount paid into the corporate treasury was deemed to stand for all the stock in the new organization. Each policy-holder was secured the right to take such proportion of the entire stock as the amount paid by him on unexpired insurance bore to the aggregate of all sums so paid by existing members. Laws of N. Y. 1896, ch. 850. We venture to say that, except in the one instance before us, no law has been enacted for converting a mutual insurance company, or other non-stock organization, into a stock company, not recognizing the members of the old company as its owners and entitled to be recognized as such in the organization of the new one.

Proceeding logically the next question to be taken up is this: Who were the members of the Germantown Farmers'

Mutual Insurance Company at the time of the attempted reorganization? The law of its creation answers that most distinctly, if effect is to be given to the plain letter thereof. Sec. 3, ch. 278, Laws of 1854, provides that "every person who shall at any time become interested in said company by insuring therein, and also his heirs, executors, administrators and assigns, continuing to be insured therein . . . shall be deemed and taken to be members thereof for and during the terms specified in their respective policies, *and no longer.*" With language so plain it seems useless to spend time endeavoring by construction to read some idea out of it not found in its letter. Words which are plain, both in themselves and when applied to the subject with which they deal, in that they lead to no absurd consequence, must be taken according to their ordinary import, nothing being added thereto or taken therefrom. *State ex rel. Heiden v. Ryan,* 99 Wis. 123, 74 N. W. 544; *Gilbert v. Dutruit,* 91 Wis. 661, 65 N. W. 511. The quoted language was changed somewhat by the amendatory act of 1878. Ch. 306, Laws of 1878. The law as changed retained all the significant words of the original act or used equivalents so as to make the dominant features more prominent. The act is in harmony with elementary principles. If it were not for the emphatic declaration the result would be the same in the absence of some provision of the charter to the contrary. It is thus laid down by text-writers, based on authority: "Membership dates in each case from the time when the insurance is effected" and "membership in the mutual insurance company ceases upon the termination of the policy." 21 Am. & Eng. Ency. of Law (2d ed.) 264–266.

From the foregoing it is evident that whatever private interests there were in the assets of the Farmers' Company over and above sufficient to satisfy its liabilities, were the property of persons holding unexpired policies therein, and that part of the legislation under which respondents seek to

justify the attempt to dispose of the corporate property without their consent must stand the same test as any legislative attempt to take property of one person and give it to another, or to impair contractual rights. We are not unmindful of the authorities called to our attention, which will be as fully as need be referred to hereafter, for support for the doctrine that there is something peculiar respecting the ownership of property of a mutual insurance company rendering it a subject of legislative disposal, or distribution by equity jurisdiction on the basis of recognizing all contributors to the fund, regardless of whether they are actual members of the company at the time thereof or not. We are unable to see any logical foundation in reason or in good law for any such doctrine.

Where is the ownership of the net assets of a mutual insurance company located? That the legal title is in the corporation goes without saying. The rule in that regard must be the same in case of one corporation as another. Why is not the equitable right,—the real beneficiary interest,—independently of the corporate use, vested in the members of the corporation in one case the same as in the other? It would seem that, after the corporate purposes are exhausted, the property of every business corporation belongs to its members, is self-evident. It is no answer to the proposition to say, no member has "any aliquot part of the corporate assets subject to identification, conservation and recovery," for that is true as to any corporation. It is likewise no answer to say, it is no part of the business of a purely mutual insurance company to distribute its profits among the members, unless that is provided for by the contract or the organic act. Unless prohibited from doing so, such a corporation, in the event of its accumulating a needless surplus, may distribute the same to its members (*Mygatt v. N. Y. P. Ins. Co.* 21 N. Y. 52, 65), and may make such distribution at such times and to such extent as the governing authority may de-

termine. *Equitable Life Assur. Soc. v. Host,* 124 Wis. 657, 102 N. W. 579. Indeed no reason is perceived why such an insurance company may not make rates with a view to the probable accumulation of a surplus and the distribution of so much thereof, from time to time, as may appear from experience not to be needed. Moreover, it may be that such distribution would be due to members and enforcible in case of the surplus being unreasonably large, as there is reason to believe it was in this case. Why was the company carrying a surplus equal to over six per cent. upon the face of its policies and more than five times the amount paid into the corporate treasury on account thereof? Assuming the management was honest, does it not look as if the rates were made with a view to the probable accumulation of a surplus and probable dividends to members therefrom? The logic of counsel's argument at this point seems to fail entirely.

However, the question at issue is not what right a member of a corporation of the sort under consideration, while it is a going concern, has in its net assets, but what right has he when it ceases to do business; when its property must necessarily pass out of its hands, though his interest in the latter situation would appear to be more appreciable in case of a surplus accumulated in contemplation of a distribution thereof to members than otherwise. Obviously, if he has an equity in the surplus, whenever it is no longer needed in any reasonable view for the corporate business, the right to realize thereon must exist.

The authorities supporting the last foregoing are not numerous. One would not expect them to be on a matter which so appeals to one's common sense as necessarily right upon fundamental principles. However, harmonious quotations from text and judicial authorities could be given at great length. To illustrate: "The principle which lies at the foundation of mutual insurance, and gives it its name, is mutuality; in other words, the intervention of each person

insured in the management of the affairs of the company, and the participation of each member in the profits and losses of the business, in proportion to his interest." 2 May, Ins. (4th ed.) § 548. "Each person insured becomes a member of the body corporate, clothed with the rights and subject to the liabilities of a stockholder." Id. § 548; 21 Am. & Eng. Ency. of Law (2d ed.) 267; *Korn v. Mut. Assur. Soc.* 6 Cranch, 192. "Although the members of a mutual company are not usually denominated stockholders, and are not stockholders in the usual sense of the word, yet they are in point of fact stockholders." 2 May, Ins. (4th ed.) § 549. "The property of the corporation belongs to its members." Opinion of district judge in *Temperance Mut. Ben. Asso. v. Home Friendly Soc.* 187 Pa. St. 38, 44, 40 Atl. 1100. "There is nothing to prevent a mutual company from carrying on its operations with a view to profits and dividends." *Mygatt v. N. Y. P. Ins. Co.* 21 N. Y. 52, 66. In *Riddell v. Harmony Fire Co.* 8 Phila. 310, the distribution of the assets, not surplus, of a mutual organization was enjoined at the suit of a member on the ground that such distribution was improper, except on surrender of the charter or dissolution of the corporation. The case proceeds upon the ground that the property of a non-stock corporation, not public, needed for its business belongs to the members, but not recoverable, of course, in possession, so long as the corporation is a going concern. The title to the property in any corporation—the substantial beneficial ownership—is in its members. 1 Clark & M. Priv. Corp. 23.

Titcomb v. Kennebunk Mut. F. Ins. Co. 79 Me. 315, 9 Atl. 732, relied upon by counsel for the respondents, is in harmony with the foregoing, notwithstanding some discussion, which will be referred to hereafter. The case went upon the ground that there were no existing policy-holders. The last policy had expired. It was absolutely without membership.

In *Carlton v. Southern Mut. Ins. Co.* 72 Ga. 371, it was

held, generally, that a member in a mutual insurance non-stock company, in the absence of charter regulations, is entitled to participate in any lawful distribution of its surplus on the basis of a partnership agreement. It was said, quoting from the syllabus:

"A mutual insurance company is based on the idea that each of the assured becomes one of the insurers, thereby becoming interested in the profits and liable for the losses. Without a charter, such an organization would be governed by the general law of partnership."

In the case in hand the distributees were held to include all stockholders, and that the word "stockholders" under the terms of the charter included every person who had contributed to the fund on hand, whether holding any unexpired insurance or not. That conclusion was reached based on language peculiar to the charter. It has no application whatever to such a charter as the one in question on that point.

It does not seem best to spend further time on the branch of the case last treated. We hold that there is no difference between business corporations as regards ownership of property. In the general sense, every member of a mutual corporation is a stockholder and is the equal of any other member similarly situated, or any member of any corporation having an equal interest, proportionally, as to holding the beneficiary title to the corporate assets. For corporate purposes only the corporate entity owns the property, otherwise it belongs to the members. No principle of law is more firmly founded in reason, and none more important to be kept in bold relief by courts so as to challenge the attention of those who have to do with corporate affairs, especially corporations dealing with the subject of insurance. The officers of such a concern have no greater authority over its assets, as regards appropriating the same to their private use, than those in other corporations. Neither does legislative power legitimately extend to interfering with property rights more in

one case than in the other. False notions of this matter, which may be, perhaps, attributed in part to courts, has led to the erroneous idea that the members of a mutual insurance company have no rights save those expressed on the face of their policies; that otherwise they have no interest in the corporate assets which the courts will protect. That is a very erroneous and very dangerous doctrine. Nothing will be more productive of good administration of such concerns as the one under discussion, than to have it definitely proclaimed by the courts, as we do now, that, while the corporate property belongs to the corporation for corporate purposes, the corporation itself belongs to the members thereof, and that any such member, however small his interest, may knock successfully at the judicial doors to prevent the use of the corporate assets in any other way than in strict harmony with what has been said. If such were not the case, wrongs of a serious nature would quite likely go without redress and rights without protection.

But it is said that under the reserved power in the constitution what the legislature may create, as regards corporate organizations, it may alter or destroy, and that as it may provide for the dissolution of a corporation it may also provide for the disposition of its assets. Regardless of the legislative control suggested, the law-making body has no authority to appropriate private property to the use of the state, except under the taxing or police power, or power of eminent domain, or to a private party. There can be no confiscation of corporate any more than of individual property.

"Corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law as well as a denial of the equal protection of the laws." *Covington & L. Turnp. R. Co. v. Sanford,* 164 U. S. 578, 17 Sup. Ct. 198; *Pembina Con. S. M. & M. Co. v. Pennsylvania,* 125 U. S. 181, 189, 8 Sup. Ct. 737; *Santa Clara Co. v. Southern Pac. R. Co.* 118 U. S. 394, 6 Sup. Ct. 1132.

We are cited to the supposed ancient rule of the common law that upon the termination of a corporation its real estate reverts to the grantor and its personalty to the sovereign and that its debts become extinguished. Some bearing is claimed for that. While it has some distinguished support in modern times (2 Kent, Comm. *307), it long since became obsolete, if it ever was the law, except as regards public corporations. It was distinctly repudiated by this court in *Lindemann v. Rusk*, 125 Wis. 210, 104 N. W. 119, 124. The authorities supporting such repudiation are substantially without conflict. *Late Corporation (Mormon Church) v. U. S.* 136 U. S. 1, 47, 10 Sup. Ct. 792; 3 Purdy's Beach, Priv. Corp. § 1327; 2 Cook, Corp. (5th ed.) § 641; 2 Morawetz, Priv. Corp. (2d ed.) § 1032; 5 Thompson, Corp. § 6746. American courts have, except in a very few instances, never recognized the doctrine, and quite recently it was held by the Court of Queen's Bench in Bankruptcy that it never had any place in the common law of England. In *In re Higginson & Dean* (1899) 1 Q. B. 325, 79 L. T. Rep. 673, WRIGHT, J., said that no instance was recorded in the books where such doctrine was ever applied by any English court and referred to an American decision, *Bank of Vincennes v. State*, 1 Blackf. (Ind.) 267, where the contrary was held, as having been reasoned on a false basis. We may safely close this branch of the case by saying that, aside from *dicta* here and there, in the whole not worthy of serious consideration, there is no legitimate support anywhere for the rule that the property of a business corporation upon its termination and the payment of its debts goes otherwise than to its members, if it has members to take. It is quite remarkable that the ancient rule should, for well nigh two centuries, have been confidently asserted from time to time by judges and text-writers as the law, including writers of such eminence as Bacon, Kyd, and Kent, have first been repudiated quite unanimously in America, and then be declared in the supposed place of its origin to

never have been a part of the common law. Here, the language of Justice BRADLEY, in *Late Corporation (Mormon Church) v. U. S.* 136 U. S. 1, 17, 10 Sup. Ct. 792, confining the application of the supposed ancient rule to public corporations, has been universally adopted.

We should not pass wholly from this subject without referring to the fact that so learned a writer as Judge Elliott in his valuable work on Private Corporations at sec. 606, adds to the corporations specified by Justice BRADLEY, to which the supposed ancient rule now applies, mutual insurance companies, referring to *Titcomb v. Kennebunk Mut. F. Ins. Co.* 79 Me. 315, 9 Atl. 732, and *Cummins v. Hollis,* 108 Ga. 402, 33 S. E. 919. The *Titcomb Case* is also referred to in 2 Clark & M. Corp. at sec. 328, but without approval so far as bearing on the question in hand. It is unfortunate that so careful a writer as Judge Elliott should have lent his distinguished approval to the cases cited by adopting the construction thereof which he incorporated into his text. An examination of *Cummings v. Hollis, supra,* shows that it went distinctly upon the ground that the corporation was public. It was based on the decision in *Mason v. Atlantic Fire Co.* 70 Ga. 604, which involved also a public corporation. By implication the *Hollis Case* held that in case of the dissolution of any corporation not public the net property would go to its members, using this language: "On the dissolution of a corporation of this character, its assets are appropriated in other ways than by a division among its members." In harmony therewith the same court said in *Dade C. Co. v. Penitentiary Co.* 119 Ga. 824, 829, 47 S. E. 338, 340: "The mere fact that a corporation has no capital stock does not necessarily deprive its members of their proportionate rights in the corporate property."

True, in *Titcomb v. Kennebunk Mut. F. Ins. Co., supra,* the supposed ancient rule of the common law was quoted with approval. That fact, as it appears, has been a disturbing ele-

ment in the preparation of text-books and in the decisions of some courts, but the fact remains that it was not applied to the case in hand. It was held, as before indicated, that the property escheated to the state because all the policies had expired and, therefore, the corporation was without membership. The idea was there met that in a distribution of a surplus by a corporation all persons who have ever been members of the company should be recognized, and it was said that such a rule for the distribution of corporate assets is entirely impracticable, as we have heretofore said. This language was used: "To distribute among them a small amount of assets, and to determine what each former policy-holder's share ought in equity to be, would be attended with difficulties and an amount of labor which the end would not justify."

It should be noted that in *Smith v. Hunterdon Co. Mut. F. Ins. Co.* 41 N. J. Eq. 473, 4 Atl. 652, the rule of distribution condemned in the Maine case was adopted by a process of reasoning not deemed to be logical. It ignored the obvious fact that the members of a corporation, and the members only, own the corporation and that it is not permitted to any court upon its own notions of equity to take any part of the corporate property and distribute it to those not members. If the rule were applicable in any event, it could not be to a corporation whose charter expressly provides, as in this case, that only persons holding unexpired risks shall be deemed members. The New Jersey court was evidently persuaded to the course adopted by *Carlton v. Southern Mut. Ins. Co.* 72 Ga. 371, failing to observe that it turned upon a construction of language in the charter which the court felt bound to hold was used to make every one who contributed to the corporate surplus a member, or stockholder, as was said, for the purposes of any distribution of such surplus.

No hardship can result to members of a mutual insurance company from their relation with the organization being considered as above stated. Every policy-holder knows, or ought

to know, that he will remain a member so long as he remains a policy-holder and no longer. He knows, or ought to know, that as soon as his membership relation is established he becomes possessed of an equitable interest in the assets of the company consisting of all accumulations prior to his time, and such as may be added thereto during his membership, but which cannot be realized on in possession in the absence of a necessary distribution of the surplus on account of the company going out of business, or in some proper way. He knows, or ought to know, that it is entirely optional with him whether to preserve his interest in the company and thereby protect his contingent rights, or to allow them to lapse by ceasing to be a member. He also knows, or ought to know, that in case of his interest so lapsing it will inure to the benefit of those associated with him who choose to retain their memberships and those who come after him, the doors of the company swinging freely to let in new members and to let old ones out according to choice, those at any moment of time being then and then only the owners of the company to all intents and purposes the same as members of any other corporation.

To summarize at this point: The members of the Germantown Farmers' Mutual Insurance Company at the time of the proceedings under ch. 229, Laws of 1903, to supersede it by a new corporation, denominated the Germantown Insurance Company, were the persons then having unexpired policies in the former. For all except corporate purposes they were the beneficial owners of its assets. In case of its being wound up the net assets constituted a fund for distribution between the members according to their respective contributions to the company's treasury. In case of any distribution of its surplus, other than following a dissolution, they were entitled to so participate. The surplus in excess of the reasonable needs of the corporation was a proper subject for distribution at any time. The right of the corporation to hold

its property in harmony with that situation, and the rights of the members to have the same so held and administered, were property interests resting on contractual obligations and so within the guaranty of the state constitution as regards the passage of laws impairing the obligations of contract, sec. 12, art. I, Const. of Wis., and that of the national constitution as regards the deprivation of property without due process of law, or denying to persons the equal protection of the laws. XIVth Amend. U. S. Const. Due process of law does not extend to the taking of private property or the violation of private rights for private ends. The act of the legislature in question, in terms or in effect, authorizes the appropriation of the property of one private corporation and the equitable interests therein of the members thereof to the use of another private corporation and of its members in violation of the corporate charter rights of the former corporation, and in defiance of the wishes of such of its members as do not choose to consent thereto. The proposition affirmed by counsel for respondents, stated at the outset in the opinion, must, therefore, be answered in the negative. The act of the legislature, ch. 229, Laws of 1903, is unconstitutional and void and furnishes no justification for the acts complained of. To that extent the complaint states a good cause of action and should have been sustained.

All cases and the authorities, generally, so far as we can discover, not excepting the one to be presently specially mentioned, upon which counsel for respondents mainly rely, are in substantial harmony as regards members of a corporation of the sort under discussion being the owners of the corporate property, subject to the corporate purposes, in the absence of some charter provision to the contrary, as we have held. If there was want of harmony as to who are to be deemed members of a corporation of the kind in hand, in the absence of a charter provision on the subject, it would not be material in this case since the charter here expressly provides that only

the holders of unexpired policies can be deemed to be members.

We have thought best to proceed to this point without referring to the decision most confidently relied upon by counsel for respondents,—*Grobe v. Erie Co. Mut. Ins. Co.* 24 Misc. 462, 53 N. Y. Supp. 628, affirmed 39 App. Div. 183, 57 N. Y. Supp. 290, or the one on which with equal confidence counsel for appellant rely,—*Schwarzwaelder v. German Mut. F. Ins. Co.* 59 N. J. Eq. 589, 44 Atl. 769, because the former, when rightly understood on the main point,—that as to the validity of legislation providing for the transfer of the property of one corporation to another and the substitution of the latter for the former without the consent of all of the members of the old corporation,—is entirely inapplicable to the case before us from the attitude of respondents, and is in harmony with the case relied upon by appellant, as we shall see, and both bear on the question yet to be treated of, whether if the appellant has a ground of complaint he invoked the proper remedy.

Before proceeding to the next point we will state briefly our view of the above cited New York case on the main question. The court there met this situation: The insurance company sought to be superseded was formed in 1874 under a general law. There was a re-organization law then in force substantially like the one here, except that it treated all policy-holders of any mutual company sought to be superseded, at the time of the re-organization proceedings, owners of the company as regards the right to take the entire stock in the new corporation. In short, it contemplated the substitution of one corporation for another without any change of membership, except at the option of the members of the old corporation. When the subject of dispute was organized there was a system of laws on the statute books, originating as early as 1853 and continued to and inclusive of the re-organization proceedings, authorizing any mutual insurance company by

consent of two thirds of its members to re-organize on the stock plan. The law in that regard, as the court held, became, by implication, at the creation of the charter of the corporation sought to be superseded a part of such charter. The court said that every person who participated in the re-organization knew of the fact, or ought to have known of it, and that by joining the company he impliedly agreed to submit to a re-organization of it at any time in the future whenever the requisite two thirds of its members so desired and the legal requirements in the matter were complied with. The result was that the re-organization was sustained solely on the ground that the re-organization proceedings were in harmony with the charter of the corporation sought to be superseded. That, as it will be observed, is in perfect harmony with the decisions as regards laws authorizing the turning of voluntary organization into corporate entities. We have just held, *Spiritual and P. Temple v. Vincent, ante,* p. 93, 105 N. W. 1026, that such re-organization law as to corporations antedating its passage cannot disturb their property rights. That is in harmony with authorities generally. *Schiller Commandery v. Jaennichen,* 116 Mich. 129, 74 N. W. 458. The difficulty with the position of counsel for respondents, as regards the New York case, is this: There was a re-organization act preceding the corporate charter and was in effect a part of it, while here the re-organization act came after the charter, and, therefore, if given effect, is a modification of it interfering with vested property rights. The vital part is not the change of the charter but the confiscation, so to speak, of the corporate property. Inferentially the New York court held that in the circumstances we have here the re-organization law could not be sustained.

Turning to the New Jersey case, upon which counsel for appellant rely, the situation before the court was precisely like that here. There was no provision, express or implied, in the charter of the corporation sought to be superseded author-

izing a re-organization without the consent of all its members, or at all. The re-organization act, the same as here, came subsequent to the corporate charter. The corporation was formed in 1893. The plaintiff became a member thereof in 1898. The re-organization act was passed in 1899. The court held that such act, as regards authorizing a new corporation to supersede the old one contrary to the wishes of any member of the old one, was unconstitutional. Thus it will be seen that both cases are in harmony. Both condemn the act in question.

On the subject of whether plaintiff has a cause of action in equity the point is made, in addition to those heretofore discussed, that the complaint, in effect, admits the incorporation of the stock company; that therefore it became vested with the property of the old organization, and, there being no allegation that the new company is not ready, willing, and able to pay all the liabilities of the old company, the latter could not maintain this action, therefore plaintiff cannot. The complaint, as we understand it, makes no admission that the new company is vested with the title to the assets of the Germantown Farmers' Mutual Insurance Company. It admits that it has manual possession thereof, but charges that the legal title and right of possession is in the mutual company. It further alleges that the officers of the latter are so concerned in the commission of the wrong that there is no reasonable ground to expect that they will efficiently assert its rights. That makes a clear case for the plaintiff, since he is pecuniarily interested in the protection of the old company's rights, to invoke equity to enforce its cause of action. Whether the right of the mutual company is legal or equitable makes no difference as regards the rights of the appellant to invoke equity. That field of judicial activity only is open to him. One of the most common and important subjects of equity jurisdiction is the protection of equitable rights formed on legal or equitable rights of corporations, public or private,

when those who should resort to judicial remedies to conserve the same will not do so. *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 256, 75 N. W. 964; *Kircher v. Pederson,* 117 Wis. 68, 93 N. W. 813; *Balch v. Beach,* 119 Wis. 77, 95 N. W. 132.

The doctrine of the New York court, cited to our attention from *Grobe v. Erie Co. Mut. Ins. Co.* 39 App. Div. 183, 57 N. Y. Supp. 290, that "the unascertained interest of a mere member of a corporation is not of sufficient significance to challenge attention of a court of equity to protect it. To permit corporations to be managed by suits in equity, instituted in the interests of persons holding such indefinite rights, would produce intolerable confusion and end substantially in the destruction of such enterprises," has no place here. We had occasion to examine it at some length in *Land, L. & L. Co. v. McIntyre, supra.* It is entirely inconsistent, as it seems, with the real functions of equity jurisdiction. The idea that a member of a corporation pecuniarily interested in the vindication or prevention of some wrong to it, which it has not capacity to do for itself because of the attitude of unfaithful officers, cannot in behalf of himself and others similarly interested apply successfully at the door of equity because his interest as a single member is small, is unworthy to be entertained. It has not found and cannot find any favor here. There is no such reproach upon our judicial system. The jurisdictions are exceptional where the rule is not recognized and broadly applied that where a cause of action exists in favor of a corporation and its governing body refuses to enforce it, any member thereof may do so, suing in equity in behalf of himself and others. The direct injury to the corporation is the primary end, in such action, to be remedied. It may be very large and the interest of the active instrument in conserving it may be very small. The former is the significant end, the latter is sufficient for the case so long as it is appreciable as a property interest. 4 Thompson, Corp.

§ 4479. In *Schwarzwaelder v. German Mut. F. Ins. Co.* 59 N. J. Eq. 589, 44 Atl. 769, under such conditions as we have here, equity jurisdiction at the suit of a single policy-holder enjoined the re-organization proceedings upon the ground that the threatened injury to him was irreparable. The court held that the re-organization could not proceed against the protest of a single member, and that as neither the common law nor statute offered any adequate legal remedy for such a deprivation of property the matter was within one of the well recognized heads of equity jurisprudence.

The point is made that the complaint alleges that the Germantown Insurance Company is a corporation organized under the provisions of ch. 89, Stats. 1898, and ch. 229, Laws of 1903, and that such being the case it must necessarily, as a *de facto* corporation at least, be the owner of the assets of the old corporation and beyond the reach of any but direct proceedings at the suit of the state to inquire into its right in the matter. True, the complaint so alleges, but the allegation must be construed in the light of the whole pleading. It can mean no more than that everything was done, which it was competent to do under the laws referred to, to make the Germantown Insurance Company a corporation. The whole gravamen of the pleading is that the law of 1903 offends against the constitution and therefore everything done under it is void. The complaint states: "The individual defendants with divers other persons combined and confederated for the unlawful purpose" of depriving the Germantown Farmers' Mutual Insurance Company of its property "and therefore caused to be organized the above named defendant, Germantown Insurance Company, and thereafter undertook to re-incorporate said Germantown Farmers' Mutual Insurance Company into a stock corporation under the name of the Germantown Insurance Company, and *undertook*" to transfer the property of the old company to the Germantown Insurance

Company, and through the acts of such individual defendants the latter company converted the property of the old corporation to its own use. While it speaks of the new creation as a corporation it pleads the underlying fact,—the fact that the proceedings to incorporate it are such only as the re-organization act, in terms, authorized. Whatever there is in the complaint, suggesting in terms that the legal effect of such acts was to create even a *de facto* corporation, is contrary to the whole spirit and obvious intent of the pleading and in any event cannot control contrary to the law governing the matter. The law of 1903 being unconstitutional, as we hold it to be, and being the inducing feature of the legislative scheme under which the re-organization occurred, the whole must fall together. That is, the general statute as regards the incorporation of mutual insurance companies must be deemed to have been incorporated in the act of 1903 for a complete scheme of re-incorporation of mutual insurance companies. Clearly the legislature would not have used the general law for the incorporation of insurance companies as a means of turning existing mutual into stock companies as it did without the enabling act of 1903. That law must be deemed the inducing provision and so the whole scheme falls under constitutional limitations. *Slauson v. Racine,* 13 Wis. 398; *State ex rel. Walsh v. Dousman,* 28 Wis. 541; *State ex rel. La Valle v. Sauk Co.* 62 Wis. 376, 22 N. W. 572; *Gilbert-Arnold L. Co. v. Superior,* 91 Wis. 353, 64 N. W. 999.

The foregoing results in the respondent company having no basis for corporate existence but the unconstitutional law, which is not sufficient to support even a *de facto* corporation. The latter can exist only where there is a valid law under which the corporation might have been created *de jure.* It is in the latter situation that the existence of a corporation can only be inquired into by a direct action in the name of the state. *Evenson v. Ellingson,* 67 Wis. 634, 646, 31 N. W.

342; *In re Incorporation of North Milwaukee,* 93 Wis. 616, 67 N. W. 1033; *Gilkey v. How,* 105 Wis. 41, 81 N. W. 120; *Winneconne v. Winneconne,* 111 Wis. 10, 12, 86 N. W. 589; *Methodist E. U. Church v. Pickett,* 19 N. Y. 482; *Vanneman v. Young,* 52 N. J. Law, 403, 20 Atl. 53.

It is proper and perhaps best to observe, in passing, that upon the facts alleged the title to the business and assets formerly possessed by the Germantown Farmers' Mutual Insurance Company is still in such company entirely unimpaired by the re-organization law and the acts which occurred under it. The business conducted by its pretended successor, the Germantown Insurance Company, must be regarded as a mere continuation of its business with all that such situation means.

If it were a fact in the case before us that the Germantown Insurance Company was a valid corporation, it would make no difference with plaintiff's cause of action if the fact remained that it had obtained wrongful possession of the assets of the Farmers' Company and the officers of the latter would not take the proper steps to remedy the mischief. This is not an action necessarily depending on whether the wrongdoer was a valid corporation or not. It is not an action to inquire into corporate existence. It is one to recover into the possession of the Germantown Farmers' Mutual Insurance Company its property *in specie,* or the equivalent thereof, which has been, as is alleged, wrongfully taken from it. That might be accomplished whether the new company was or was not a corporation *de jure* or *de facto.* It is only a mere incident of the action that it is held to be neither.

Some other questions of minor importance are discussed in the briefs of counsel. They are included, it is thought, in those heretofore treated, or are rendered immaterial by what has been said. The discussion of the ground of demurrer that the complaint is insufficient to state a cause of action, to which this opinion has been mainly directed, really covers

the charge of want of jurisdiction and want of capacity to sue. The cause of action of the Farmers' Company is grounded on the wrongful conduct of the individual defendants, which was made fruitful by means of the unconstitutional law under which the new company was organized, in that it resulted in depriving the Farmers' Company of its property. The cause of action of appellant, standing for himself and others, is grounded on his pecuniary interest in the enforcement of the rights of his company. His right is equitable, and his remedy necessarily so. On that account, and since there is no legal remedy for him, the indirect injury is of sufficient and substantial character to be a proper subject for redress. The jurisdiction of the subject matter is grounded on the necessary uses of equity, and the insufficient basis for the corporate existence of the new organization, if that were a necessary fact. Plaintiff's legal capacity to sue is based on the foregoing situation and the fact that without such capacity the wrong complained of would go unredressed, the attitude of those who only could directly act for the Farmers' Company being hostile to such action. The challenge to the jurisdiction of the person and to improper joinder of causes of action appears not to be pressed here, and to be so obviously without merit as not to require more than this passing mention.

We apprehend that we have sufficiently covered the whole subject presented for consideration as to render it useless to proceed further.

By the Court.—The order appealed from is reversed.

Respondents moved for a rehearing.

Lewis & Roach, attorneys, and *Quarles, Spence & Quarles,* of counsel, for the appellant.

Sawyer & Sawyer and *G. A. Kuechenmeister,* for the respondents.

The following opinion was filed March 20, 1906:

MARSHALL, J. All points suggested to secure a modification of the former decision have received due attention. The argument in favor of the motion in that regard is significantly headed "Explanatory." Why counsel regarded an explanation of their position necessary is not perceived. Counsel are always presumed here to present in good faith the cause of their client as they find it. They are not supposed, in any case, to be otherwise concerned. It was not thought here, prior to the explanation, that the situation was different in this instance than commonly. Any case after presentation *here* must necessarily be disposed of as it seems to deserve. If it is a bad one, such disposition is liable to indicate that character with more or less clearness, yet without any reflection whatever on counsel for merely having performed professional duties, giving the best reasons occurring to them, after a diligent study of the subject, and referring to authorities within their reach, by them supposed to apply, to aid the court. We may well credit counsel for respondents with having distinguished themselves in that regard. They probably called to our attention, and in a helpful manner, every feature of the law of 1903 affecting favorably its validity. With like probability they invoked every legal principle bearing upon the matter, citing an array of authority for examination, evincing the most commendable industry. The case of respondents did not suffer for want of any aid counsel could have afforded the court.

What is said in the discussion in support of a decision is directed wholly to the case as it appears. That is treated in a wholly impersonal way. It may reflect on the party responsible for the situation, but not on the attorney who merely performs his professional duty. It does not seem, *here*, that any explanation whatever was required from counsel who so ably presented the case at the bar, or the other distin-

guished counsel who was absent, both of whom are held in the highest regard.

What was formerly said as to that part of the decision holding that the so-called re-organized company is not even a *de facto* corporation was grounded upon very familiar principles. The result was inevitable. It cannot be changed. If it were true that the decision in that regard will result in the hardships suggested, as to leaving a large number of policy contracts in a state of uncertain validity, and a large amount of securities, taken in the name of the new organization, with an uncertain status, it would not change the law. If one unlawfully takes the money of another and loans it to a third person presumed to know the facts, it is hardly a good answer to a claim for restoration that the vindication of the right of such other will embarrass the wrongdoer and those who have dealt with him, on account of the former having confused his money with that of such other and loaned the two in combination to the third person.

It is thought that the former opinion renders it plain that the business of the so-called new corporation was in effect a mere continuance of that of the Farmers' Company under a somewhat new name. The so-called new policy-holders, and the so-called old policy-holders whose contracts have not expired, are policy-holders with equal standing in the Germantown Farmers' Mutual Insurance Company. The last officers elected of such company are still its officers and will necessarily continue to be such until their successors shall have been duly elected and qualified according to the charter. Whatever titles there are outstanding as to tangible or intangible things, belonging to the Farmers' Company, are held merely in trust therefor by the collection of individuals who have assumed another name. The whole beneficial interest in such property is in the Farmers' Company. It has a right to be immediately clothed with the legal title thereto, so far as it is not possessed thereof, and to that extent the trustees of the

same are fully competent, without delay, to make the proper conveyance. Facing the situation just as it is, without thought of how to avoid the effect, it is not perceived why there is any physical or legal difficulty in promptly restoring the former situation, preserving reasonably the equities of the promoters of the new enterprise growing out of their money having been paid into the common fund for so-called stock.

We note what counsel say as to persons holding policies issued in the name of the so-called new company not having participated in, and so perhaps not being bound by, the adjudication that such company is not a corporation in any sense and may hold it to be otherwise on the doctrine of estoppel. We are not unmindful of the rule in that regard and that in some circumstances it extends beyond corporations *de facto* and includes such cases as that of a collection of persons falsely assuming to be a corporation, when there is no semblance of corporate existence. *Citizens' Bank v. Jones,* 117 Wis. 446, 94 N. W. 329; *Clausen v. Head,* 110 Wis. 405, 85 N. W. 1028. It does not apply, however, where the parties knew, or ought to have known, the true situation, for then the essential element, the reasonable belief in the corporate existence and reasonable reliance thereon, does not exist. Here all parties must be presumed, conclusively, to have known that the ostensible corporation was not a corporation at all, but was a mere usurping representative of the Farmers' Company.

So it will be found, by looking at the matter rightly, that the supposed difficulties in the way of a restoration of the rightful condition of things as to the Farmers' Company, are but spectres: merely contemplated, they may grow: approached with one purpose, they will merely recede: approached with a firm determination to accept the inevitable situation, they will disappear as the dew before the morning sun.

By the Court.—The motion is denied.

J. H. Clark Company, Appellant, vs. Rice, Respondent.

January 30—March 20, 1906.

Pleadings: Inconsistent defenses: Joinder: Patents and patent rights: State regulation: Statutes: Constitutional law: Evidence: Hearsay: Prejudicial error: Fraudulent representations: Officers of corporations: Witnesses: Competency: Depositions: Trial: Production of testimony: Discretion: Special verdict: Form: Instructions to jury.

1. Under sec. 2657, Stats. 1898, a defendant may plead as many defenses and counterclaims as he may have, even though they are based on inconsistent legal theories, and hence he may join a defense of fraud for which rescission is sought and a counterclaim for payments made, with a counterclaim for breaches of the same contract.
2. Ch. 438, Laws of 1903, amending ch. 268, Laws of 1901 (requiring all promissory notes or other evidence of indebtedness, taken or given for any patent, patent right, or interest therein, to have written or printed thereon *in red ink* the words: "The consideration for this note is the sale of a . . . patent, patent right . . . or interest therein," prescribing a penalty for failure so to do, and making such note or other evidence of indebtedness nonnegotiable), is an invasion of sec. 4898, R. S. of U. S., and unconstitutional and void because in conflict with sec. 8, art. I, Const. of U. S.
3. In an action on a note given for the purchase of a patent right, one defense was that defendant was induced to give the note by the false and fraudulent representations of plaintiff. The special verdict, as originally submitted to the jury, contained the question: "Did the defendant, at the time he talked with Mr. R. [one of plaintiff's officers] relative to an extension of the time of payment of the note, have knowledge of all facts and circumstances which he now claims to know?" which, before rendition of the verdict, was withdrawn from the jury. The evidence, stated in the opinion, was not undisputed. *Held*, that the court's ruling was error.
4. In an action on a note given for a patent right, in which the defendant pleaded as a defense the false and fraudulent representations of the plaintiff inducing the purchase of the patent right, statements made on the part of plaintiff to other persons, not in the presence or hearing of defendant, some of them long

after the execution of the note, are not admissible to prove bad faith and an actual intent to deceive on the part of the plaintiff.

5. Newspaper articles, circulars, pamphlets, etc., many of them never seen by defendant, and some of them not in print until after the making of the note, are likewise inadmissible.

6. The admission of evidence of similar transactions between plaintiff and other persons in no way involved in the litigation, offered to show fraudulent intent, is prejudicial error.

7. Representations, to be fraudulent, must relate to a present or past state of facts.

8. Relief as for deceit cannot be obtained for nonperformance of a promise looking to the future.

9. A mere expression of opinion or belief as to the value or quantity of an article sold, if so intended and understood, is not a representation of a fact, and, though false, does not amount to fraud.

10. Whenever there is doubt as to whether a statement is a mere expression of an opinion or a statement of fact the question must be determined by the jury or court.

11. False representations, to be actionable, must be relied upon by the purchaser, and be of such character and made under such circumstances as to justify the purchaser in relying upon them.

12. The president, secretary, or other principal officer of a corporation is, in effect, a party to the action, and his examination taken under sec. 4096, Stats. 1898, so far as competent, is independent evidence in the case, notwithstanding his presence in court. It is otherwise in the case of an employee.

13. No abuse of discretion in rejection of testimony can be predicated on the limiting of the respective parties to fifteen witnesses on the question of the utility of a device covered by a patent.

14. It is contrary to the spirit of the statute governing special verdicts for the court to submit several questions together, and instruct the jury that they are so submitted because the instructions given applied equally to each, and then submit the same number of other questions, each of which was dependent upon the answer to one of such first questions.

15. In an action on a note given for a patent right one question submitted as part of the special verdict was whether, at the time of giving the note, the patented device had any practical utility for the purposes for which it was patented, and an instruction on that subject, that the jury must confine their "inquiry to the purposes named in the patent and those only," without stating the full purpose of the patent, is *held* misleading, although the jury were allowed to take the patent to their room and construe it for themselves.

16. In such case it was error to refuse to instruct the jury that they must answer such question "Yes," unless it was established that the device was of no practical value; that if the device was of any practical utility then they should answer the question in the affirmative.

17. In an action on a note given for a patent right it was alleged that the patent was of no utility and that the plaintiff induced the defendant to give the note by false and fraudulent representations, and it was *held* error to refuse a requested instruction to the effect that if defendant had full opportunity to investigate the operation of the device, and there was no concealment or fraud on the part of the plaintiff, then it became the duty of the defendant to investigate and form his own opinion as to the value and utility of the patented device, and that he could not rely upon mere expression of opinion made by the officers and agents of plaintiff.

APPEAL from a judgment of the circuit court for Columbia county: B. F. DUNWIDDIE, Judge. *Reversed.*

It appears from the record and is undisputed that the plaintiff and the defendant entered into a written agreement dated November 30, 1903, wherein and whereby the plaintiff made, constituted, and appointed the defendant its agent in and for Ramsey county, Minnesota, for the sole purpose of selling, vending, and putting within said county the fuel-saving device of the plaintiff and by it manufactured, owned, and controlled by letters patent of the United States, and of recommending and selecting subagents for the plaintiff in and for any county of the United States, and whereby the plaintiff agreed to deliver to the defendant or such subagents on board cars said device upon payment of prices therein named, which were not to be more than $10 for each furnace attachment and $7.50 for each stove attachment. Said contract contained numerous other agreements not necessary here to mention, and recited that the same was made in consideration of $1,500 to the plaintiff in hand paid. Such payment was made by the defendant giving to the plaintiff two judgment notes, each for $750 and interest. Upon the note falling due June 1, 1904, the plaintiff entered judgment against

the defendant for the amount thereof, with interest and costs, June 28, 1904. Upon the petition verified by the defendant July 6, 1904, and a proposed answer verified by the defendant on the same day, the trial court, on September 16, 1904, opened such judgment and allowed the defendant to answer and defend against the payment of said note. That answer as amended alleged three defenses: (1) To the effect that said two judgment notes were obtained by the plaintiff from the defendant by false and fraudulent representations and warranties upon which the defendant relied; (2) that there was a want of consideration for the giving of said notes; (3) that the giving of said notes was against public policy in failing to comply with ch. 438, Laws of 1903. Such amended answer also alleged two counterclaims: (1) In effect reiterating the facts so stated by way of defense, and alleging that the defendant was damaged by such false representations and warranties in the sum of $1,550; and (2) in effect reiterating the facts so stated by way of defense, and therein tendering back to the plaintiff all rights and interests under said contract, and thereby electing to rescind said agreement by reason of such alleged false and fraudulent representations and warranties. The plaintiff, by way of reply to the first counterclaim, among other things, alleged in effect that after the note in suit became due the defendant requested and procured from the plaintiff an extension of the time for the payment thereof with knowledge of all the facts; that the contract was made by defendant after he had investigated the merits of the device, and then ratified by him with full knowledge of all the facts; and to the second counterclaim the plaintiff replied to the effect that the plaintiff did not own the other note and had no knowledge of the ownership of the same, and that the defendant requested and procured an extension of the time of payment of said note with full knowledge of all the facts.

At the close of the trial the jury returned a special verdict to the effect (1) that the patented device known as the "Clark

Fuel Saver" did not, at the time of the giving of the note in question, have any practical utility for the purposes for which it was patented; (2) that the *J. H. Clark Company,* its officers or agents, before the giving of the note in question did represent to the defendant in substance that said Clark fuel saver was a practical and successful device; (3) that such representation was false; (4) that the *J. H. Clark Company,* its officers or agents, did represent to the defendant in substance that said device could be successfully used upon all stoves and furnaces for heating purposes; (5) that such representation was false; (6) that the *J. H. Clark Company,* its officers or agents, before the giving of the note in question did represent to the defendant in substance that said fuel-saving device could be used successfully with all kinds of fuel; (7) that such representation was false; (8) that the *J. H. Clark Company,* its officers or agents, before the giving of the note in question did represent to the defendant in substance that by the use of said device at least fifty per cent. of the fuel would be saved over and above the amount required to produce the same heat without the use of said device; (9) that such representation was false; (10) that the *J. H. Clark Company,* its officers or agents, before the giving of the note in question did represent to the defendant that the said Clark fuel saver was very valuable; (11) that such representation was false; (12) that the *J. H. Clark Company,* its officers or agents, before the giving of the note in question did represent to the defendant that said plaintiff had thoroughly tested said device and that such tests had proved all that was claimed for it; (13) that such representation was false; (14) that such representation or representations were made to the defendant for the purpose of inducing him to enter into said contract and give the note in question; (15) that the defendant, in giving the note in question, did rely on said representations; (16) that the defendant was induced by said representations to give the note in question; (18) that the

company's officers or agents making such representation did know or ought to have known that such representations were false; (20) that the defendant did expend in attempting to sell the device in the county purchased by him and in operating the same the sum of $50. Thereupon the trial court made findings of fact and conclusions of law to the effect (1) that the plaintiff was, prior to November 30, 1903, a Wisconsin corporation and the owner of said letters patent of the device known as the "Clark Fuel Saver," and that both parties were located at Portage; (2) that the plaintiff's business was as therein stated; (3) that the contract between the parties and the notes given by the defendant to the plaintiff were as above stated; (4) that by the agreement made and the transaction had between the plaintiff and the defendant the plaintiff sold, transferred, and assigned to the defendant an interest in a patent or patent right; that the said note in suit and the other note given at the same time were given for an interest in a patent or patent right; that neither of said notes had written or printed thereon in red ink or otherwise, "The consideration for this note is the sale of a patent or patent right, or interest therein," nor did either of said notes have thereon in red ink or otherwise any other words of similar import or meaning, or any words indicating what the consideration of said notes really was; (5) that the note in suit matured June 1, 1904; that within a few days thereafter, the defendant *Rice* inquired of one of the plaintiff's officers as to whether the time of payment thereon could be extended, but the defendant did not, at the time of making such inquiry or at any other time, promise to pay said note or any part thereof, except the promise made in and by the note itself; that the defendant, at the time he made such inquiries, did not have full knowledge as to all the facts or as to his rights in the premises. Upon such special verdict and findings and conclusions of law, and pursuant to the order of the trial court, it was, on motion of the attorneys for the defendant, adjudged that the complaint

in this action be and the same was thereby dismissed, with costs and disbursements in favor of the defendant, taxed at $350.49. From that judgment the plaintiff appeals.

Daniel H. Grady, for the appellant.

For the respondent there was a brief by *H. E. Andrews,* attorney, and *John A. Aylward* and *Rufus B. Smith,* of counsel, and oral argument by *Mr. Andrews* and *Mr. Aylward.*

CASSODAY, C. J. 1. Error is assigned because the court refused to compel the defendant to elect as to the remedy upon which he would rely under the pleadings. The statute authorized the defendant, by answer, to set forth "as many defenses and counterclaims" as he might have, "whether they be such as were formerly denominated legal or equitable, or both." Stats. 1898, sec. 2657. Under this section it has been held that "a defendant may plead as many defenses and counterclaims as he may have, even though they are based upon inconsistent legal theories. With a defense of fraud for which he seeks a rescission of the contract sued on, and a counterclaim for payments made thereon, the defendant may, therefore, join a counterclaim for breaches of such contract, if held binding." *South Mil. B. H. Co. v. Harte,* 95 Wis. 592, 70 N. W. 821; *Roberts v. Decker,* 120 Wis. 102, 108, 97 N. W. 519, 521. In this last case it was said that "under the Code a defendant may plead as many defenses as he has, even though they be based on inconsistent legal theories, unless they be so repugnant in fact that proof of one disproves the other." In the case at bar there is no such repugnancy. Besides, the defendant recovered nothing on either of his counterclaims. The judgment merely dismissed the complaint with costs.

2. Error is assigned because the court found, as a matter of law, that the note sued on in this action was given in violation of ch. 438, Laws of 1903, and hence was void. That

act was amendatory of ch. 268, Laws of 1901, and declared, in effect, that all promissory notes and other evidences of indebtedness, taken or given for any patent, patent right, or interest therein, should have written or printed thereon *in red ink* the words "The consideration for this note is the sale of a . . . patent, patent right . . . or interest therein," as the case might be, and declared that "any person who" should sell a patent, patent right, or any interest therein, without complying with such statute, should "be liable to a penalty equal to the face of the note so taken," and that "all notes or other evidences of indebtedness taken" as required by the provisions of said statute should "be nonnegotiable, and be subject to all the defenses in the hands of an innocent holder that the same would have if not transferred." It appears from the undisputed evidence, as well as the findings of the court, that the written agreement between the parties constituted a sale or assignment of an interest in a patent or patent right; and that neither of the notes taken therefor had written or printed thereon, in red ink or otherwise, the words required by the act, nor any such indorsement in words of similar import. These things being so, it is obvious that if the act in question is valid, then, by taking the notes without such indorsement, the plaintiff became "liable to a penalty equal to the face" of the notes so taken. This court has repeatedly held that a positive requirement of a statute and a penalty imposed for noncompliance render the transaction, if contrary to the statute, void. *Troewert v. Decker,* 51 Wis. 46, 8 N. W. 26; *Howe v. Ballard,* 113 Wis. 375, 89 N. W. 136; *Julien v. Model B., L. & I. Asso.* 116 Wis. 79, 91, 92 N. W. 561; *Brown v. Gates,* 120 Wis. 349, 351, 97 N. W. 221, 98 N. W. 205; *Pearson v. Kelly,* 122 Wis. 660, 664, 100 N. W. 1064. If the act in question is valid, then the conclusion of the trial court is correct, that the note in suit was taken in violation of the statute and is therefore void. The important question in the case is whether ch. 438, Laws

of 1903, is a valid enactment. All must concede that Congress has the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors *the exclusive right* to their respective writings and discoveries." Sec. 8, art. I, Const. of U. S. The federal statute declares:

"Every patent or any interest therein shall be assignable in law by an instrument in writing, and the patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States." Sec. 4898, R. S. of U. S. [U. S. Comp. St. 1091, p. 3387].

The precise question presented is whether the act of our state legislature interferes with the rights thus given by federal authority. It seems to be well settled:

"Where, by the application of the invention or discovery for which letters patent have been granted by the United States, *tangible property comes into existence,* its use is, to the same extent as that of any other species of property, subject, within the several states, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police." *Patterson v. Kentucky,* 97 U. S. 501, 504, 506, affirming 11 Bush, 311.

It is said in the opinion of the court in that case that "the Kentucky statute under examination . . . is, in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens. It expresses in the most solemn form the deliberate judgment of the state that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. . . . The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself."

See, also, *Minnesota v. Barber,* 136 U. S. 313, 326, 327, 10 Sup. Ct. 862; *Walla Walla v. Walla Walla W. Co.* 172 U. S. 1, 16, 19 Sup. Ct. 77; *Webber v. Virginia,* 103 U. S. 344, 348; *Emert v. Missouri,* 156 U. S. 296, 316, 317, 15 Sup. Ct. 367; *Bement v. Nat. H. Co.* 186 U. S. 70, 90, 91, 22 Sup. Ct. 747.

But state courts and some federal courts differ widely as to what constitutes a legitimate exercise of domestic or police powers of a state over tangible property coming into existence by virtue of a patented device. The supreme court of the United States does not seem to have reached the question here presented. In the earliest federal case found, a statute of Indiana was under consideration which required any obligation taken for a patent right to have inserted in the body of the instrument and above the signature of the maker the words "Given for a patent right," and made it a misdemeanor not to comply with such statute. The case came before Mr. Justice DAVIS of the supreme court of the United States, who held that:

"The law of Indiana regulating the sale of patent rights within that state is unconstitutional and void. Property in inventions exists by virtue of the laws of Congress, and no state has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress, he has a right to go into the open market anywhere within the United States and sell his property." *Ex parte Robinson,* 2 Biss. 309, Fed. Cas. No. 11,932.

That case was followed by Mr. Justice SWAYNE of the supreme court of the United States, in considering a similar statute of Ohio, where a note taken for a patent right was required to have the words "Given for a patent right" prominently written or printed on the face thereof and above the signature, and it was held that such statute impaired the value of the property in the patent right created by the constitution and laws of the United States, and hence was unconstitutional and void. *Woollen v. Banker,* 2 Flip. 33, Fed.

Cas. No. 18,030. The Indiana statute was again considered by the United States circuit court for Indiana, Judge WOODS presiding, and it was again held to be "clearly unconstitutional," citing and following *Ex parte Robinson, supra,* and four adjudications of the supreme court of Indiana; and it was there pointed out that *Patterson v. Kentucky, supra,* had "reference to local restrictions upon the sale or use of tangible property" coming into existence under the patent, and had no application to a note taken on the sale of an interest in a patent right. *Castle v. Hutchinson,* 25 Fed. 394. So it has been held that a state cannot impose a discriminating tax upon the exclusive right given to a patentee. *In re Sheffield,* 64 Fed. 833, 834.

An act of the legislature of Pennsylvania to regulate the execution and transfer of notes given for patent rights required that any promissory note or other negotiable instrument given for an interest in a patent should have written or printed on the face thereof the words "Given for a patent right," otherwise the note would be nonnegotiable, and, if taken with knowledge, the person taking the same would be deemed guilty of a misdemeanor; and the federal circuit court of the eastern district of that state held that:

"The monopoly granted by a patent is a property right created under the constitution and laws of the United States, and by those laws made assignable, and therefore a state law which prescribes that negotiable instruments in the ordinary form shall not be given or accepted for an assignment of the patent itself is unconstitutional, as obstructive of the exercise of a right vested by federal law." *Pegram v. Am. A. Co.* 122 Fed. 1000.

It has been held by the supreme court of Illinois that a state statute of similar import to the Pennsylvania statute was "unconstitutional and void as an attempt to regulate and control by state legislation a matter of which Congress has sole jurisdiction." *Hollida v. Hunt,* 70 Ill. 109. So it has been held in Minnesota that "a state has no power to regulate or

restrict the sale of patent rights." *Crittenden v. White,* 23 Minn. 24. So the supreme court of Michigan held that a statute of that state "imposing unusual conditions on the transfer of patent rights by requiring notes given therefor to show it, and making it a misdemeanor to take or transfer them otherwise, is unconstitutional as impairing rights that are regulated and protected by Congress." *Cranson v. Smith,* 37 Mich. 309. To the same effect, *People v. Russell,* 49 Mich. 617, 14 N. W. 568; *Wilch v. Phelps,* 14 Neb. 134, 15 N. W. 361. In *Comm. v. Petty,* 96 Ky. 452, 29 S. W. 291, it was held that:

"While the states have jurisdiction to legislate on the matter of the use or sale of the article which is brought into existence by virtue of the application of the patented process, Congress alone has power to regulate the sale of the right of the inventor in his discovery, and the manner of the disposition of such rights."

To the same effect, *Rumbley v. Hall,* 107 Ky. 349, 351, 54 S. W. 4.

As indicated, there are adjudications the other way, notably in New York, Pennsylvania, and Ohio. The adjudications seem to differ mostly upon the construction given to the local statute, or the effect given to the decision of the supreme court of the United States in *Patterson v. Kentucky,* 97 U. S. 501. So far as this court has spoken on the subject it is in harmony with the views above expressed. *State v. Lockwood,* 43 Wis. 403. It should be observed that Mr. Justice SWAYNE was a member of the court and concurred in the decision of *Patterson v. Kentucky, supra,* and yet no mention was made therein of his decision in *Woollen v. Banker,* 2 Flip. 33, Fed. Cas. No. 18,030, decided only a little more than a year before, as it obviously would have been had there been any intention of overruling it. The same is true as to the decision of Mr. Justice DAVIS in *Ex parte Robinson,* 2 Biss. 309, Fed. Cas. No. 11,932, made a

few years previously, and followed by Justice SWAYNE in the case mentioned. We are constrained to hold, upon reason and authority, that ch. 438, Laws of 1903, is an invasion of the federal statute, and therefore unconstitutional and void.

3. The special verdict, as originally drawn and submitted to the jury, contained this question: "Did the defendant, *Rice,* at the time he talked with Mr. Russell relative to an extension of the time of payment of the note, have knowledge of all the facts and circumstances which he now claims to know?" After the jury returned into court and asked for information on the special verdict, the court withdrew that question from the consideration of the jury; and, after the rendition of the verdict, the court found, as matters of fact, "that within a few days after maturity of said note sued on, the defendant, *Rice,* inquired of one of the plaintiff's officers as to whether the time of payment thereon could be extended, but the defendant did not, at the time of making such inquiry or at any other time, promise to pay said note or any part thereof, except the promise made in and by the note itself; that the defendant, at the time he made such inquiries, did not have full knowledge as to all the facts, or as to his rights in the premises;" and, as a conclusion of law, the court found "that said defendant, *G. R. Rice,* did not, after the giving of said note upon which this action is brought, ratify said note in any manner." The plaintiff contends that such findings of the trial court were not justified by the evidence, and that that court should either have answered the seventeenth question in the affirmative or submitted the same to the jury for determination. After careful consideration we are unable to say that the evidence bearing upon the question is undisputed, and hence it was error to withdraw the question from the jury.

4. The principal controversy is as to whether the defendant was induced to execute the written agreement and the

notes in question by false representations made on the part of the plaintiff. Numerous exceptions are taken to the admission of testimony. A considerable portion of such testimony is mere hearsay. Nine witnesses were allowed to testify as to statements made on the part of the plaintiff to other persons, not in the presence or hearing of the defendant, and some of them long subsequent to the execution of the notes and agreement. Of course, such statements could not have induced the defendant to sign such papers. The admission of such testimony is sought to be justified, "not for the purpose of proving the representations made to the defendant," but to prove bad faith and an actual intent to deceive on the part of the plaintiff. This court has recently held that, in an action upon a contract of sale which the defendant claimed he had been induced to sign by false representations on the part of the plaintiff, it is immaterial whether such representations were made with a fraudulent intent or not, and that the admission of evidence of similar transactions between the plaintiff and other persons in no way involved in the litigation, offered for the purpose of showing such intent, was prejudicial error. *Standard Mfg. Co. v. Slot,* 121 Wis. 14, 18, 19, 98 N. W. 923, and cases there cited. To permit such proof of numerous independent transactions imposed upon the plaintiff the burden of disproving a multitude of collateral charges, not in issue nor involved in the controversy, and therefore was highly prejudicial to the plaintiff. For the same reason it was error to admit in evidence newspaper articles, circulars, pamphlets, etc., in no way tending to prove that the defendant was induced to execute the written agreement and notes in question by false representations made on the part of the plaintiff. Many of such articles were never seen by the defendant, and some of them were not in print until after the making of the notes and the agreement. And yet the court charged the jury that they might consider all representations proven to have been made to the defendant

up to the giving of the note in suit, whether made by word of mouth or in written or printed statements, proven to have been made by the company's officers or agents, providing such statement was as to some existing or past fact. It is well settled that "representations, to be fraudulent, must relate to a present or past state of facts, and relief as for deceit cannot be obtained for nonperformance of a promise looking to the future." *Patterson v. Wright,* 64 Wis. 289, 25 N. W. 10; *Louis F. Fromer & Co. v. Stanley,* 95 Wis. 56, 69 N. W. 820; *Field v. Siegel,* 99 Wis. 605, 609, 75 N. W. 397; 14 Am. & Eng. Ency. of Law (2d ed.) 39. As a general rule, a mere expression of opinion or belief as to the value or quality of an article sold, if so intended and understood, is not a representation of fact, and, though false, does not amount to fraud. The mere fact that a statement takes the form of an expression of opinion, however, is not always conclusive. Whenever there is any doubt as to whether it is made as a mere expression of opinion or as a statement of fact, the question must be determined by the jury or court. 14 Am. & Eng. Ency. of Law (2d ed.) 34–41; *Mosher v. Post,* 89 Wis. 602, 605, 62 N. W. 516; *Maltby v. Austin,* 65 Wis. 527, 27 N. W. 162; *Warner v. Benjamin,* 89 Wis. 290, 62 N. W. 179; *Forest L. Co. v. Hanley,* 94 Wis. 23, 68 N. W. 413; *Deming v. Darling,* 148 Mass. 504, 20 N. E. 107. Moreover, false representations, to be actionable, must be relied upon by the purchaser, and be of such a character and made under such circumstances as to justify the purchaser in relying upon them. *Farr v. Peterson,* 91 Wis. 182, 64 N. W. 863; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932. See *Kimball v. Bangs,* 144 Mass. 321, 11 N. E. 113. Numerous exceptions were well taken to the admission of testimony in violation of one or more of the principles of law stated. Of course the terms of the contract were embodied in the written agreement, which speaks for itself.

5. Error is assigned because the defendant was allowed to read from the depositions of C. F. Mohr, J. E. Jones, and J. M. Russell, taken as adverse witnesses under sec. 4096, Stats. 1898, when such witnesses were present in court. This court has recently held that the president, secretary, or other principal officer of a corporation is, in effect, a party to the action, so that his examination, so far as competent, becomes independent evidence in the case, notwithstanding his presence in court. *Johnson v. St. P. & W. C. Co.* 126 Wis. 492, 105 N. W. 1048. Each of the witnesses mentioned appears to have been an officer of the plaintiff corporation. It is otherwise in case of a mere employee. *Hughes v. C., St. P., M. & O. R. Co.* 122 Wis. 258, 99 N. W. 897; *Eastern R. Co. v. Tuteur, ante,* p. 382, 105 N. W. 1067.

6. Error is assigned for the rejection of testimony. We perceive no abuse of discretion in limiting the respective parties to fifteen witnesses on the question of the utility of the device covered by the patent.

7. In charging the jury the court submitted questions 2, 4, 6, 8, 10, and 12 together, for the reason, as stated therein, that the instructions given thereon applied equally to each, and then submitted together questions 3, 5, 7, 9, 11, and 13, each of which was dependent upon the answer to one of such even-numbered questions. This method of submitting a special verdict is contrary to the spirit of the statute and to numerous adjudications of this court, commencing with *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442. Sec. 2858, Stats. 1898.

8. The first question submitted was whether, at the time the note was given, the patented device had any practical utility for the purposes for which it was patented. In charging the jury on the subject they were told that they must confine their "inquiry to the purposes named in the patent and those only," but did not state the full purpose of the patent. This was misleading, although the jury were allowed

to take the patent to their room and construe it for themselves.

9. Error is assigned because the court refused to instruct the jury to the effect that they must answer the first question "Yes," unless it was established that the device was of no practical value; that, if the device was of any practical utility with any kind of coal, then they should answer that question in the affirmative. We perceive no reason why such instructions or their equivalent should not have been given. Contrary to rules of law already stated, the court refused to instruct the jury to the effect that if the defendant had full opportunity to investigate the operation of the device and there was no concealment nor fraud on the part of the plaintiff, then it became the duty of the defendant to investigate and form his own opinion as to the value and utility of the device, and he could not rely upon mere expressions of opinion made by the officers or agents of the company.

10. Counsel for the plaintiff complain because the trial court did not follow the ruling of this court in *Herman v. Gray,* 79 Wis. 182, 48 N. W. 113. But the question as to the want of consideration, alleged as a defense in the answer, was not submitted to the jury. Besides, the judgment dismissing the complaint, with costs, is not based upon the special verdict, but, as indicated, upon the findings of the court. This renders it unnecessary to review the numerous errors assigned, several of which seem to be well taken. The case seems to have been tried upon a misconception as to the legal rights of the parties. Upon a retrial the special verdict should be made to conform to the issues presented by the pleadings. We cannot say, as a matter of law, that the evidence fails to sustain any of the findings of the jury to the effect that the defendant was induced to execute the written agreement and notes in question by false representations made on the part of the plaintiff. *Pratt v. Hawes,* 118 Wis. 603, 611, 612, 95 N. W. 965. The rules of law applicable to the

trial of such a question are simple and well understood. Enough has been said to serve as a guide upon a new trial.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

THE STATE EX REL. MILWAUKEE MEDICAL COLLEGE, Respondent, vs. CHITTENDEN and others, Appellants.

February 3—March 20, 1906.

CERTIORARI. (1, 3, 4) *Cause of action:* Quasi-*judicial tribunals: Discretion.* (3–7, 11) *Parties.* (3, 6–8, 11–13, 24) *Jurisdiction: Jurisdictional error.* (12, 13, 23, 24) *Use of writ: What may be reviewed.*

STATE BOARD OF DENTAL EXAMINERS. (8–10, 17, 27, 32, 36–38) *Licensing of dentists: Dental colleges: Adjudication as to status: Reputability: Evidence: Presumptions.* (14) *Character of authority of board.* (18) *Procedure: Due process of law.* (25, 27, 32, 33, 35–38) *Powers of board: Exercise: Making rules: Notice of contemplated action.*

CONSTITUTIONAL LAW. (15) *Judicial powers.* (16) *Legislative powers.* (19) *Due process of law.* (26) *Delegation of legislative powers.* (28–31) *Police regulations.*

ACTIONS. (1, 2) *Place of trial.* (17) *To determine status of persons.*

COURTS. (20–23) *Circuit courts: Appellate jurisdiction: Supervision of inferior courts and jurisdictions: Use of writ of* certiorari. (21) *Right of appeal.*

DEFINITIONS. (1) "*Action.*" (2) "*State officer.*" (5) "*Party.*" (15) "*Judicial powers.*" (16) "*Legislative powers:*" "*Legislative discretion:*" "*Administrative discretion.*" (30) "*Reasonable,*" *as applied to police power.* (34, 38) "*Reputable,*" *as used in law regulating the practice of dentistry.*

Relator was accorded the *certiorari* remedy to vacate a sentence of nonreputability. There was a motion to change the venue to Dane county, under ch. 366, Laws of 1905, relating to actions against state officers. It was denied. Prior to May 27, 1903, ch. 56c, Stats. 1898, relating to dentistry, provided for a board of five members, appointed by the governor, a majority to

be from the Wisconsin State Dental Society. It was required, upon the faith of his diploma, to license to practice dentistry, any regular graduate of a reputable incorporated dental college requiring candidates for graduation to take two full courses of lectures, of five months each. Said chapter, by ch. 411, Laws of 1903, was changed, making the mandatory feature as to issuing licenses discretionary, giving the Dental Society power to nominate a majority of the board, and fixing as the requisites for an efficient diploma, reputability of the college in the judgment of the board, preliminary education of matriculants enough for entrance to the junior class of an accredited high school, and four courses of lectures of at least seven months each, in separate years. It remained silent as to the board's controlling examinations for matriculation. Prior to March 1, 1902, a custom existed permitting matriculants to make up entrance deficiencies the first year. Prior to the occurrences material here, the board ruled thus: entrance qualifications shall be equal to those required for entrance to the junior year of a high school; examinations shall be conducted by the superintendent of public instruction, or his appointee; three full courses of not less than seven months each, in separate years, shall be required for graduation, as to students matriculating prior to the session of 1903–1904, and one additional course commencing with such session; colleges shall not charge students less than one hundred dollars per term nor rebate advertised fees; no student shall be received or retained, deficient in entrance qualifications, and compliance with such rules shall be a condition of reputability. The change as to entrance qualifications was unknown to relator till it became morally bound to accept students for 1902–1903 as before. Six so accepted were made freshmen and academic students as well. They made up the deficiencies during the year. June 15 to June 20, 1903, inclusive, the board considered conduct of relator as aforesaid, also as to rebates and other alleged transgressions, resulting in its being adjudged reputable, though censured on the second point and admonished against further transgressing. Thereafter it was mooted as to whether the students should have credit for the year partly spent in preparation. The board ruled negatively. Nevertheless the students were otherwise registered. Before graduation day, according to such registration, relator indicated willingness to comply with the board's will to save condemnation. An action was then commenced against it by a student to test the matter, the board being given opportunity to defend, which it declined. The decision was against the relator. The board formally and without notice condemned it as not reputable, upon failing to

obtain a more definite answer, as to whether it purposed obeying the court without further contest, than that it did unless notified by the board not to do so and that otherwise it would be deemed not reputable. Such decision was reversed for judicial error.

Controlling Principles.

1. An independent proceeding commenced by an original writ, such as *certiorari*, *mandamus*, and the like, is an action under sec. 2595, Stats. 1898.
2. The ordinary meaning of "state officer" is head of a state department, such as governor, secretary of state, and the like. It should be thus restricted when used without circumstances indicating any other intent.
3. Where a decision by a *quasi*-judicial tribunal affects injuriously and with substantial directness one not a party to the record having no other efficient legal remedy, he may, in the discretion of the court possessed of the jurisdiction, have the use of its writ of *certiorari* to remedy the wrong as to jurisdictional errors.
4. If in the exercise of sound judicial discretion an injured person ought to be accorded an original writ of *certiorari*, it is an abuse of authority to refuse it.
5. The rule that no one but a party is entitled to use the remedy of *certiorari* is to be regarded as using the term "party" in its broad sense: that of including all persons injuriously affected with substantial directness and having no other efficient legal remedy, whether they are parties to the record or might properly be such.
6. When the writ of *certiorari* is granted to one neither a party to the record nor necessary thereto,—the tribunal in the proceeding sought to be reviewed having jurisdiction of the party or parties and of the subject matter,—such writ reaches only jurisdictional errors committed in deciding a matter within its jurisdiction to decide, proceeding properly.
7. When the proceeding to be reviewed was direct against person or property, the personal right being the only one involved or being one coupled with another primary right, he is a necessary party and, if not brought in by proper citation, a writ of *certiorari* in his behalf will reach jurisdictional error as to proceeding at all in the matter and excess of jurisdiction as well.
8. A decision as to the status of a dental college, incidental to passing upon an application for a license to practice dentistry, based on a diploma issued thereby, is within the rule stated as regards discretionary authority to permit the use of the writ of *certiorari* to correct jurisdictional errors.

9. It is proper, in administering the law regulating the practice of dentistry, for the official board, of its own motion, or on petition of a college of which it has jurisdiction, to adjudicate its status as regards reputability.
10. The adjudicated status of a college is presumed to continue till the presumption shall have been reasonably rebutted, under the general rule that "when the existence of a person, a personal relation, or a state of things is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised, from the nature of the subject in question."
11. If the status of a dental college is adjudicated in an action *in rem*, whether the proceeding is solely against the *res* or one to pass upon an application for a license and against the *res* as well, such college may properly be accorded the *certiorari* remedy to test the decision for jurisdictional error, either as to the subject matter or excess of jurisdiction.
12. The writ of *certiorari* is not usable as a means of reviewing legislative discretion, or judicial discretion, or a determination which is strictly a usurpation in that it was pronounced by one having no authority or semblance of authority.
13. The writ of *certiorari* on behalf of a proper applicant is a proper means of testing, for jurisdictional error, the decision of a *quasi*-judicial tribunal having authority, under some circumstances, to deal with the subject involved, or of a tribunal of such dignity that its action in the matter might probably be injurious to such applicant if allowed to stand unchallenged.
14. The authority of the board, under the law regulating dentistry, to pass upon the reputability of colleges, is neither legislative nor judicial but is *quasi*-judicial: that species of authority commonly intrusted to individuals, boards, or commissions to determine matters of fact when that is essential to the performance of administrative duties.
15. The judicial authority of the constitution is power to administer remedies for remedial rights, formerly exercisable exclusively by courts: to make judicial decisions, strictly so called, in actions or special proceedings and to enforce the same.
16. Authority which, by the constitution, is vested in the legislature, is the power to make law. It may be exercised, leaving in the particular instance to some other agency the duty of determining questions of fact essential to the application thereof. The former involves legislative, the latter administrative discretion.
17. When the condition of a person, the thing denominated status, is a matter of public concern, it is a proper object to be dealt

with and settled by a direct proceeding in any tribunal having jurisdiction of the *res*, and that applies to the status of a college under the system of legislative regulation of the profession of dentistry.

18. Where the subject matter involved in a judicial or *quasi*-judicial proceeding is the intangible thing denominated status, the proceedings in respect thereto requisite to a legitimate determination are the same as in a case where the subject matter is of a tangible character.

19. In any such case the rule applies that no one shall be condemned in his person or his property without first having had his day in court according to the law of the land: the fundamental principles of justice.

20. The constitutional grant of appellate jurisdiction given to circuit courts does not include authority to review the proceedings of an inferior tribunal on the merits by the use of a writ of *certiorari*. The use thereof, to commence an action, relates to judicial authority to supervise inferior courts and jurisdictions.

21. The appellate jurisdiction of the constitution is one thing, the right of appeal is another. The latter is a creature of the legislature and does not exist where the legislature has not acted.

22. The power of superintending control given to circuit courts is limited by means afforded for its exercise: the functions of the original writs referred to in connection with the grant, all of which appertain to matters of jurisdiction.

23. The writ of *certiorari* was, by the constitution, made an appurtenance, as before, to the jurisdiction of superintending control, with its common-law function in that regard and that only. Such function extends wholly to matters of jurisdiction, as regards independent proceedings.

24. Jurisdictional error, as to a court proceeding according to the course of the common law, relates to the person or the subject matter. Such error as to other tribunals extends to clear errors of law, such as deciding an issue of fact one way when the reasonable inferences from the evidence so strongly point the other way as to leave no reasonable basis for the decision.

25. The law governing the board of dental examiners does not confer thereon power to do more than to execute the legislative will along lines expressed by it with reasonable definiteness. The mere making of reasonable rules to be followed in performing administrative duties, is not the exercise of legislative authority.

26. The true distinction between delegation of power to make law and delegation of power to administer law is this: the former

contemplates exercise of discretion as to what the law shall be, the other exercise of discretion in the administration of law.

27. The implied grant of authority to the dental board to determine the status of a dental college, no reference being made to the subject of notice thereto and opportunity to be heard, does not suggest power to proceed in that regard without such notice: on the contrary, it implies action in accordance with the fundamental principles of justice.

28. The legislature may properly designate any agency it sees fit within the state, reasonably calculated to act justly in the matter, to nominate persons for appointment to administer its mere police regulations.

29. The police power includes legislative authority to make all regulations reasonably necessary or conducive to the public welfare.

30. The word "reasonable" limits the police power, both as to subjects to be regulated and the character of the regulation, by express constitutional inhibitions and implied ones as well, and the judgment of the judiciary as to what is within the realm of such subjects and reasonable, fair doubts in all cases being deemed sufficient to turn the scales in favor of legislative authority whenever it shall have been asserted.

31. There is no such thing as a police power which is above the constitution, or which justifies reasonable or any violation of express constitutional prohibitions or manifest implied ones; the power is hedged about on all sides by constitutional restraints with the judiciary to stand guard at the boundaries.

32. The feature of the dental law prescribing conditions upon which a diploma from a dental college may be received as sufficient evidence of qualifications to permit of a license to practice dentistry being issued to the holder thereof without examination as to his fitness, does not deny or prejudice the right to study for such profession.

33. The dental board, in passing upon a question within its jurisdiction to solve by the exercise of judgment, is supreme, so long as it proceeds to a reasonable conclusion upon evidence bearing on such question.

34. The meaning of the word "reputable" as used in the law regulating the practice of dentistry is "worthy of good repute;" it relates to real character, not to mere reputation in that regard. (On this MARSHALL, J., dissents.)

35. The power conferred upon the dental board relates to reasonable administration of matters appertaining to the public welfare, not to interferences with the internal management of dental colleges.

36. The law for the regulation of the practice of dentistry does not

authorize the official board to invade the private affairs of a dental college in respect to its rate of tuition or whether it shall grant concessions from advertised rates or by taking charge, *in invitum*, of its examinations as to entrance qualifications.

37. A statutory requirement as to educational qualifications for entrance upon a course of study at a dental college as a condition of the diploma eventually awarded being *prima facie* sufficient to prove qualifications for the practice of dentistry, unaccompanied by a prohibition of the common practice of allowing students to make up, in some reasonable degree, deficiencies in preliminary education during the first year after matriculation, must be presumed to contemplate such practice and the continuance thereof.

38. Reputability, as the term is used in the dental law, relates to that which will enable the college to do good work and the actual accomplishment thereof; it is separate and distinct from other requisites as to a diploma being a passport to the favor of the official board as regards the issuance of a license. It may or may not exist, and all the other requisites be present.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Certiorari to the State Board of Dental Examiners. This is the substance of the recitals in the writ: The relator is a domestic corporation organized in 1893, having a paid-up capital of $150,000, and authorized to conduct a college for teaching, among other things, dentistry. It has property in its business of the value of $175,000, and a good will of great value. It has at all times conducted a first class reputable dental college. It has graduated therefrom 312 persons, including twenty-seven of the class of 1905, all being worthy professional men. It belongs to the National Association of Dental Faculties, an organization extending throughout the United States for the purpose of improving the art of dentistry and maintaining suitable educational requirements. It is on a plane in all respects, having regard for age and investment, with the great dental colleges of the world. It is

in fact reputable and was so regarded by such board up to about the time for it to deal with relator's class of 1905. The college is so regarded by said association and by the National Association of Dental Examiners, composed of official boards throughout the United States, including that of Wisconsin. June 26, 1905, said State Board—without evidence, or notice to the relator or knowledge that any such thing was impending, or of any investigation, upon an application for a license—in secret and executive session, promulgated a resolution in these words:

"*Resolved,* That in the judgment of the Wisconsin State Board of Dental Examiners the *Milwaukee Medical College,* Dental Department, is not a reputable dental school."

That was done to injure relator, not as a result of judgment by the board on evidence produced before or accumulated by it, and entered of record as a basis therefor. No change in the status of relator occurred between the time said board dealt with the former's class of 1903, treating the college as reputable, and the passage of said resolution. Said board, since such condemnation, has adhered thereto and declared its intention to so continue and refuse recognition to relator's graduates as possessing diplomas from a reputable institution. By reason thereof relator cannot proceed with its ordinary business or suspend the same without serious loss. All diplomas issued by it not yet passed upon by the board are by the latter's aforesaid action rendered invalid as regards a basis for the practice of dentistry in this state, to the relator's great financial detriment, without due process of law and contrary to the fourteenth amendment to the national constitution. Such board grounds its action on supposed authority conferred upon it by ch. 411, Laws of 1903, which contravenes such amendment and also various provisions of the state constitution upon which relator relies.

Before return was made to the writ the appellants moved

the court for a change of venue to Dane county under ch. 366, Laws of 1905, which was denied, and the ruling was duly excepted to.

In due course a return was made, which, as to matters material here, is about like this: In all proceedings mentioned in the writ the board acted pursuant to ch. 56*c*, Stats. 1898, and ch. 411, Laws of 1903. The record of the meeting at which the resolution complained of was adopted, is in these words:

"Milwaukee, Wis., June 26, 1905.

"Hotel Pfister. Executive meeting of the Wisconsin State Board of Dental Examiners: Drs. C. C. Chittenden, F. A. Tate, C. S. McIndoe, J. J. Wright present.

"The following resolution was presented and adopted:

"*Resolved,* that in the judgment of the Wisconsin State Board of Dental Examiners, the *Milwaukee Medical College,* Dental Department, is not a reputable dental school.

"Motion was made and seconded that we reconsider the action taken on the above resolution to gain further information on the subject."

The circumstances leading up to such action are these: March 1, 1902, the board in session provided, among other things:

"Sec. 1. The minimum qualifications for the session beginning 1900–1901 shall be equivalent to those for entrance into the second year of a high school. Such minimum beginning with the season of 1902–1903 shall be the qualifications for the third year of a high school. All matters appertaining thereto shall be determined by the state superintendent of public instruction, or his special appointee, whose decision shall be final, subject to the board's approval. All certificates of educational qualifications before being accepted shall be verified by correspondence with the authority issuing the certificate.

"Sec. 2. Attendance of students upon three full courses of not less than seven calendar months during each and separate calendar years should be required before final examination for graduation. Attendance upon four full courses of not less

than seven months each, in separate academic years, should be required before examination for graduation for all students matriculating after the session of 1902–1903."

As early as September 13, 1902, the relator was informed that strict compliance with the rules of the board would be required. They are identical with the rules adopted by each of the two associations mentioned in the writ, each making strict compliance therewith a criterion of reputability. There were in force during the time covered by the occurrences leading up to the action complained of, these other rules:

"Sec. 23. Colleges must maintain their fees for tuition as published in their announcements, and where a college has increased its fees for tuition no students shall be received at the former fee. There shall be no evasion of this rule by giving to any student, in lieu of the full fee, any rebate, commission, concession, or privilege."

"Sec. 36. The minimum tuition fee for colleges recognized by this board shall be $100.00 per term, beginning with the session of 1902–1903, except as in case of sec. 37."

"Sec. 37. This board will, until further notice, grant to the extent of its judicial powers under the state laws, higher recognition to diplomas of such dental colleges as require credentials for matriculation equivalent to high school graduation and whose course of study is extended to four years of at least seven calendar months each for graduation."

October 4, 1902, a charge was laid before the board by a representative of the Wisconsin College of Physicians and Surgeons, located in Milwaukee, of the relator having violated said rule 23. October 6th, the board formally commenced an investigation thereof. During such investigation a representative of relator filed charges against said Wisconsin College as to its reputability. Whereupon it was determined to include that in the pending inquiry. Much evidence was taken regarding the first charge. October 7, 1902, the board convened to continue its labors. The relator appeared with its attorney and objected to the board's jurisdiction, which objection was overruled. The investigation as

to the first charge having been closed, subject to relator's right to produce evidence, it declined to offer any. The board evinced readiness to hear any such evidence as relator desired to offer in support of its charges. By its attorney, it declined to proceed. The board then adjourned without making any decision. Later the president of relator made charges against the official examiner appointed by the state superintendent of public instruction, as regards his fairness in the administration of his duty. January 27, 1903, at a meeting called for the purpose of considering such charges, relator having opportunity to be present, the charges against the Wisconsin College were withdrawn. The board then resolved that any future occurrence of one college filing charges against another and refusing to sustain them by evidence would not be regarded as reputable. The relator was notified thereof, and that the charges against the Wisconsin College had been dismissed.

There being no appearance by relator at the meeting to investigate its charges against the examiner, and he being present to meet any evidence that might be presented against him, his administration was approved.

June 3, 1903, relator requested the board to define the status of certain special students, as regards eligibility for the junior year and requesting that they might have that standing, contingent upon their showing proper entrance qualifications and performance of the work of the freshman year. The request was based on the facts, as claimed, that prior to the session of 1902–1903, the board permitted freshmen to make up entrance requirements the first year; that relying thereon, relator corresponded with those who thereafter became special students, and was not informed of any change until a few weeks before the opening of the regular term; that up to such time there was no definite plan as to the required scope of the examination and when the change came relator was not prepared therefor; that those who failed to pass had moral

claims upon the relator, which it had endeavored to discharge by making them special students in the freshmen class while they were entered as students in the academic department, which required them to spend in the latter three hours per week on algebra, rhetoric, and composition. That was followed by a communication, signed by authority of the board, to each of the members of relator's graduating class of 1903, who had a pending application, based upon his diploma, for a license, to the effect that the issuance of the license would be conditioned upon evidence being produced satisfactory to the board touching the reputability of the relator on these points: First. Did it secure, or seek to secure, students for 1902–1903 by offering to accept and retain them for less than advertised fees? Second. Did it attempt to evade the rules of the board as to requirements for admission by taking students who had failed to pass the educational test? Third. Had it by its officers attacked, intentionally, the fitness of the official examiner and his character as an honest public servant? Fourth. Was the dean of relator justified in failing and refusing to meet the board and confront its examiner with proof of the charge made by such dean after having agreed to do so? Each applicant for a license was at the same time notified of the date and place when the board would be in session to receive evidence upon such points. At such time and place the relator appeared by attorney, and the graduates likewise appeared. The former objected to any proceedings to inquire into the reputability of relator without formal notice to it, specifying the charges against it, if any, and its being made a party. The objection was overruled. A motion was then made for the issuance of licenses upon a previous decision of the board made September 15, 1902, declaring the college reputable. The board asserted jurisdiction to reconsider the matter because of evidence in its possession, and ruled that the burden of proof was upon the applicants. Their attorney maintained the contrary, but that in any event they had successfully car-

ried the burden by presenting the previous judgment until the board, or some one, presented evidence reasonably sufficient to supersede it. The board persisted, suggesting that the evidence upon which their position was based was of a public nature and open to inspection. The attorney for the graduates persisted, claiming that they were entitled to rely on such judgment until evidence was formally presented in their presence displacing it. Relator objected to a decision as to its reputability in advance of specific charges being filed and opportunity given to it to be heard. The session was continued to 2 p. m. June 15, 1903, at which time, by a vote of four to one, relator was declared to be reputable. At a subsequent meeting held the following 20th day of June it was in due form held that relator was guilty of violating rule 23, however that the transgression was not so serious as to warrant withholding licenses from the graduates of 1903, though relator was censurable in the matter. It was admonished that any further violation of the rules would not be tolerated.

October 9, 1903, the board interrogated the National Association of Dental Faculties as to what standing the students in relator's institution were entitled to for 1903–1904, who ranked as freshmen for 1902–1903 because of not having the requisite entrance qualifications but were permitted by the college to make up deficiencies during the year, suggesting that, as it understood the matter, such students were to be required to show the requisite qualifications to enter upon the study of dentistry, and spend three years more before graduation.

October 15, 1903, the special examiner passed favorably upon the qualifications of Oscar Hansen, Robert A. Burg, Ernest Redemon, and Fred E. Wrigglesworth, who failed at the examination in 1902.

After considerable correspondence between the president of the board and the authorities of the National Association of Dental Faculties, the determination of the latter was defi-

nitely made known, to the effect that students who were not up to the entrance qualifications for 1902–1903, according to the report of the official examiner, should be required to show requisite entrance qualifications before entering upon the session of 1903–1904, and take three years more of successful study before being permitted to graduate. The board was admonished that "these students are to take three years more." It adopted that decree as its own, and thereafter proceeded accordingly.

January 28, 1904, the relator was admonished of the importance of its taking note of the rule "that no dental college shall be recognized as reputable by this board in which students are accepted or allowed to continue in attendance, upon any conditions other than those required of regular matriculants, whose credentials have been duly approved by the accredited and acceptable special examiner appointed by the state superintendent of public instruction, and who have in all other respects complied with the requirements of the published 'Rules and Regulations' of this board 'regarding the general conduct and reputability of colleges desiring recognition of their diplomas.' "

February 6, 1905, inquiry was made of relator as to whether it proposed graduating with the class of 1905, students who were carried as irregulars, and freshmen as well, for 1902–1903, and whose names appeared in the catalogue for 1903–1904 as juniors. That related to the six students, Allen Schlafer, Fr. Wrigglesworth, Alb. Frederich, Rob. A. Burg, Oscar Hansen, and Ernest H. Redemon. An investigation disclosed that such students, though they failed to pass the entrance examination for the year 1902–1903, had nevertheless been catalogued as entitled to credit for the work of that year in the regular course and had actually been given such credit. The relator was thereupon informed that its conduct in that regard would not be recognized by the board.

May 17, 1905, one of the six students in due form com-

menced a *mandamus* action against relator to compel it to graduate him as one of its class of 1905 and to issue to him the usual diploma. There were recitals in the petition for the writ which were in substance or legal effect embodied in the latter, and may be stated thus: The college advertised for students to commence the study of dentistry at the commencement of the school year of 1902–1903, saying: The entrance qualifications will be the same or equivalent to those required for entrance to the third year of an accredited high school: the college subscribes to the rules governing the conduct of dental colleges in this state adopted by the Wisconsin State Board of Dental Examiners: deficiencies in entrance qualifications may be made up during the first year.

Induced by the representations thus made by the college to the general public, for the purpose of obtaining attendants in its dental department, the petitioner devoted time and money in acquiring the necessary qualifications to take up the study of dentistry at such college, and was pursuant to such representations duly matriculated in the dental department October 3, 1902, paying the regular fees which have not been returned. He continued his course of study for the full period of three years, paid all fees demanded or demandable by the college, complied with all its rules, and passed successfully all examinations required thereunder for graduation in the class of 1905. Nevertheless the college refuses to accord to him the customary diploma. No claim is made that he is not qualified in every respect to practice the profession of dentistry. The petitioner failed to pass the examination under the special examiner before commencing his course, but made up all deficiencies in 1902–1903 and then applied for a re-examination which was refused. Thereafter he passed the requisite examination for and obtained a third grade certificate to teach in the public schools of the state under the county superintendent of schools for Green Lake county. The requisite qualifications for obtaining such certificate are the equivalent of those re-

quired to enter upon the third year of a high school course. Such certificate was presented to the college and at its request was then presented to the official examiner, who refused to recognize the same. The college is a member of the National Association of Dental Faculties and during the period of petitioner's study at the college it conducted its affairs in strict harmony with the standard fixed by said association. During all such time it was customary at such college, and others of reputability, to permit entrance requirements to be made up the first year, if necessary. The State Board with full knowledge of such custom as to such particular college on several occasions recognized it as reputable, both before and after petitioner's matriculation.

The college made return to the alternative writ of *mandamus* admitting substantially all the aforesaid matters and submitting to the court as its only justification, substantially these facts: About the date of the petitioner's matriculation the college was notified by the State Board that the rule or custom permitting deficiencies in entrance qualifications to be made up the first year of the course had been abrogated. He was soon thereafter notified thereof, but insisted upon remaining and pursuing his studies according to the matriculation agreement. In March, 1905, the college was notified by such board that the petitioner could not receive credit for the year during which he was engaged, in part, in making up entrance qualifications. The college has refused petitioner the privilege of graduating, but based its action on the requirements of the State Board of Dental Examiners. The representations made in the catalogue of 1902–1903, upon which relator relied in matriculating at the institution and entering upon his course of study, were in harmony with the standard then existing of the National Association of Dental Faculties, and that of other reputable colleges.

The cause was submitted upon the writ and return and proper motions in respect thereto. Findings of facts were

made accordingly upon which the court decided as matter of law: First. The relator, in matriculating at the college for the school year of 1902–1903, in reliance upon the representations made by the institution, secured a contractual right to a diploma upon his complying with the conditions so brought to his notice. Second. The abrogation of the rule permitting entrance qualifications to be made up the first year of the college course, of which notice was not given to the college until about October 4, 1902, and not brought to the notice of relator until after his matriculation, is not effective as to him. Third. He was wrongfully denied the privilege of graduating with the class of 1905.

The State Board after service of the writ and before return was made was notified of the action and given full opportunity to defend. On the 26th day of June, 1905, there was placed before it a copy of the decision in the action but it did not know then of the issuance of the peremptory writ. Thereupon it adopted, substantially without consideration, the resolution condemning the college as disreputable, in the form heretofore quoted, but before adjournment reconsidered its action and postponed the matter "to gain further information on the subject." The next day it made inquiry of the college as to whether it intended to graduate the six students with the class of 1905. There were then pending several applications for licenses by members of such class, based solely on their diplomas. The relator replied to the inquiry aforesaid that it had defended the *mandamus* action in good faith, doing all the law permitted; that diplomas had not been granted to the six students and none would be, unless the college was forced to do so, and that at all points the board was privileged to appear and defend the position of the college. Thereupon the board made inquiry as to what steps, if any, the college intended to take to avoid giving a diploma notwithstanding the court's decision. The college replied, calling attention to the fact that the board had been conditioned at all times to aid the

former in defending the latter's rules and stated that the college would be obliged to defer to the judgment, unless the board ordered it in writing not to issue the diploma, or gave it notice in writing that in the event of such issuance it would declare the college not reputable, in which case it would not issue the diploma. Much anxiety over the situation was expressed and the board was requested to make answer to the letter on that day. The board made no answer to the communication until after the occurrence of the next day. On such day the fact was brought to the attention of the board that the peremptory writ had been issued. It thereupon, without any communication to the college, took up the resolution that was laid over "to gain further information on the subject" and unanimously adopted it. In so doing the board did not act without evidence. The relator knew, prior to such action, of its having violated the rules of the board as to its standard of reputability and that it would be dealt with upon an occasion arising therefor. The relator was not notified June 26th, or immediately prior thereto, that the board was about to act upon applications for licenses made by the former's graduates. The board did not act without any investigation or any application for a license pending before it, or without any change in the status of the relator tending to prove it to be not reputable between May, 1903, and June 26, 1905. The board did, as alleged, refuse to recognize the diplomas of the relator issued to graduates of the class of 1905 as entitling them to licenses without examination and persists in so doing. Such refusal is based upon the decision as to the reputability of the college in its dental department. In making the decision the board did not act without evidence tending to prove the school not reputable, or without notice to the plaintiff, or without giving it opportunity to be heard, or without due process of law, or otherwise than in the performance of its duties in good faith.

The return was amended by stating that at the time of the

passage of the resolution in question there were twenty-one applications for licenses on file with its secretary, made by members of the relator's graduating class for 1905, and supported by its certificates of graduation.

The court decided, in due form, that the board committed jurisdictional error in condemning the relator as not reputable, without notice and without opportunity to be heard upon specific charges brought to its attention. A judgment of reversal in due form was accordingly entered, from which this appeal was taken.

For the appellants there were briefs by the *Attorney General* and *Joseph B. Doe,* and oral argument by *Mr. Doe.* They contended, *inter alia,* that *certiorari* is an action. Secs. 2595, 2596, 2812, 2845*a,* Stats. 1898; *Morse v. Spees,* 25 Wis. 543; *McNamara v. Spees,* 25 Wis. 539; *Owens v. State,* 27 Wis. 456; *Starkweather v. Sawyer,* 63 Wis. 297, 300; *Auerbach v. Marks,* 94 Wis. 668, 673; *Lewis v. C. & N. W. R. Co.* 97 Wis. 368, 372; *State ex rel. Manitowoc v. Manitowoc Co.* 59 Wis. 15; *State ex rel. Green Bay & M. R. Co. v. Jennings,* 56 Wis. 113; *State ex rel. Court of Honor v. Giljohann,* 111 Wis. 377. The defendants are state officers within the meaning of ch. 411, Laws of 1903. Anderson, Law Dict. 728; 23 Am. & Eng. Ency. of Law (2d ed.) 327; *State ex rel. Clyatt v. Hocker,* 39 Fla. 477, 63 Am. St. Rep. 174; *State ex rel. Holmes v. Dillon,* 90 Mo. 229; *State ex rel. Kellogg v. Currens,* 111 Wis. 431; *State v. Vandersluis,* 42 Minn. 129; *State v. Creditor,* 44 Kan. 565; *Burch v. Hardwick,* 30 Grat. 24–31 *et seq.; Maxwell v. Hartmann,* 50 Wis. 660; *New York & H. R. R. Co. v. Mayor,* 1 Hilt. 562–568. The writ could not properly issue upon the petition of respondent. 4 Ency. Pl. & Pr. 165; *Elliott v. Superior Court,* 144 Cal. 501, 103 Am. St. Rep. 111; *Starkweather v. Seeley,* 45 Barb. 164; *Washington Co. A. Co. v. Stewart,* 9 Idaho, 376, 74 Pac. 955; *People ex rel. Finch v. Overseers of Poor,* 44 Barb. 467; *Pay v. Whitaker* (Tex.) 49 S. W. 367; *People ex rel. Lawrence*

v. Schell, 5 Lans. 352; *Scheiwe v. Holz,* 168 Ill. 432, 48 N. E. 65; *Watson v. May,* 6 Ala. 133; *Colden v. Botts,* 12 Wend. 234; *Smith v. Stevens,* 8 Ired. Law (N. C.) 38; *People ex rel. Lawson v. McCaffrey,* 42 Barb. 530. Ch. 411, Laws of 1903, is valid as a grant of legislative power. *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 67; *Ex parte Frazer,* 54 Cal. 94; *Ex parte Cox,* 63 Cal. 21; *Ex parte McNulty,* 77 Cal. 164, 19 Pac. 237; *In re Thompson,* 36 Wash. 377, 78 Pac. 899; *Harding v. People,* 10 Colo. 387, 15 Pac. 727; *State v. Vandersluis,* 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; *Blue v. Beach,* 155 Ind. 121, 50 L. R. A. 64; *State v. Briggs,* 45 Oreg. 366, 77 Pac. 750; *Singer v. Maryland,* 72 Md. 464. Ch. 411, Laws of 1903, is not invalid as taking property without due process of law. 22 Am. & Eng. Ency. of Law (2d ed.) 780; *Reetz v. Michigan,* 188 U. S. 505; *Ex parte Whitley,* 144 Cal. 167, 77 Pac. 879, 894; *People ex rel. Sheppard v. Dental Examiners,* 110 Ill. 180; *Dent v. West Virginia,* 129 U. S. 114; *State v. Call,* 121 N. C. 643, 646, 28 S. E. 517; *Frances v. State,* 57 Ohio St. 1, 47 N. E. 1041; *Gothard v. People,* 32 Colo. 11, 74 Pac. 890; *In re Thompson,* 36 Wash. 377, 78 Pac. 899; *State v. Carey,* 4 Wash. 424, 30 Pac. 729; *State ex rel. Smith v. Dental Examiners,* 31 Wash. 492, 72 Pac. 110; *State ex rel. Kellogg v. Currens,* 111 Wis. 431; *State v. Heinemann,* 80 Wis. 253; *Wilcox v. Hemming,* 58 Wis. 144; *Wilkins v. State,* 113 Ind. 514, 16 N. E. 192; *State v. Hathaway,* 115 Mo. 36, 21 S. W. 1081; *Opinion of Justices,* 138 Mass. 601; *Scholle v. State,* 90 Md. 729; *State Board of Health v. Roy,* 22 R. I. 538; *Parks v. State,* 159 Ind. 211; *Isenhour v. State,* 157 Ind. 517; *Ex parte Gerino,* 143 Cal. 412; *State v. Heath,* 125 Iowa, 585; *State ex rel. Port Royal M. Co. v. Hagood,* 30 S. C. 519; *People ex rel. Cox v. Justices,* 7 Hun, 214; *Hildreth v. Crawford,* 65 Iowa, 339; *Ex parte McNulty,* 77 Cal. 164, 19 Pac. 237; *State v. Vandersluis,* 42 Minn. 129, 43 N. W. 789; *Hewitt v. Charier,* 16 Pick. 353; *Eastman v. State,* 109

Ind. 278, 10 N. E. 97; *People v. Phippin,* 70 Mich. 6, 37 N. W. 888; *Richardson v. State,* 47 Ark. 562, 2 S. W. 187; *Ex parte Spinney,* 10 Nev. 323; *Harding v. People,* 10 Colo. 387, 15 Pac. 727; *Antle v. State,* 6 Tex. App. 202; *Musser v. Chase,* 29 Ohio St. 577; *Thompson v. Hazen,* 25 Me. 104; *State v. State Medical Board,* 32 Minn. 324, 20 N. W. 238. The selection of a certain number of the board from the State Dental Society does not render the law invalid. *Overshiner v. State,* 156 Ind. 187, 59 N. E. 468; *U. S. v. Breen,* 40 Fed. 402; *Ex parte Cox,* 63 Cal. 21. Whether a statute is reasonable or not is for the legislature and not for the courts. *State v. Creditor,* 44 Kan. 565, 24 Pac. 346; *Hedderich v. Smith,* 103 Ind. 203, 1 N. E. 47.

For the respondent there was a brief by *Timlin & Glicksman,* of counsel, and oral argument by *W. H. Timlin* and *H. J. Killilea.* They contended, *inter alia,* that respondent was entitled to the writ. *People ex rel. Forest Comm'r v. Campbell,* 152 N. Y. 51, 46 N. E. 176; *State ex rel. McGovern v. Trenton,* 60 N. J. Law, 402, 38 Atl. 636; *Tallon v. Hoboken,* 60 N. J. Law, 212, 37 Atl. 895; *Jersey City v. State ex rel. Traphagen,* 53 N. J. Law, 434, 22 Atl. 190; *Champion v. Board of Comm'rs,* 5 Dak. 416, 41 N. W. 739; *State ex rel. Enderlin State Bank v. Rose,* 4 N. Dak. 319, 58 N. W. 514, 26 L. R. A. 593; *People ex rel. Sheridan v. Andrews,* 52 N. Y. 445; *Rhode Island Society v. Budlong* (R. I.) 25 Atl. 657; *State ex rel. West Jersey T. Co. v. Camden,* 56 N. J. Law, 431, 29 Atl. 163; *Miller v. Jones,* 80 Ala. 89, 93; *State ex rel. Wood v. Goldstucker,* 40 Wis. 124; *State ex rel. Hallauer v. Gosnell,* 116 Wis. 606; *Flanagan v. Pierce,* 27 Tex. 78. There was no error in denying the motion for change of venue under ch. 366, Laws of 1905. (1) Because *certiorari* is not an action. *Neuman v. State,* 76 Wis. 112, 118; *People ex rel. Forest Comm'r v. Campbell,* 152 N. Y. 51, 46 N. E. 176. (2) Because if an action it is not against the state or against a state officer. *McCarty v. Ashland Co.*

61 Wis. 1; *State ex rel. Kempster v. Milwaukee,* 90 Wis. 487. Even if the board can be deemed state officers the action must be against them in their official capacity. Stats. 1898, notes of cases p. 2903; *Lynn v. Polk,* 8 Lea (Tenn.) 121, 128, 129; *Hodgson v. Nickell,* 69 Wis. 308. The State Board of Dental Examiners is a tribunal within the meaning of sec. 8, art. II, Const. *State ex rel. Cook v. Houser,* 122 Wis. 534, 561; *Hayward v. Bath,* 35 N. H. 514; *State ex rel. Gilbert v. Police & Fire Comm'rs,* 11 Utah, 378, 40 Pac. 264; *Cunningham v. Squires,* 2 W. Va. 422; *Sherman Dist. Board v. Hopkins,* 19 W. Va. 84; *Chenowith v. Randolph Co.* 26 W. Va. 230; *Poteet v. Comm'rs,* 30 W. Va. 58, 8 S. E. 97; *Alderson v. Comm'rs,* 31 W. Va. 634, 8 S. E. 274; *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, 465; *State ex rel. Kelleher v. School Board,* 134 Mo. 296, 35 S. W. 619; *Illinois State Board of Dental Examiners v. People ex rel. Cooper,* 123 Ill. 227, 13 N. E. 201; *Strong, Petitioner,* 20 Pick. 495; *Merrick v. Arbela,* 41 Mich. 630, 2 N. W. 922. Ch. 411, Laws of 1903, is unconstitutional (1) in that it is not a law, but an enactment attempting to confer upon the State Board of Dental Examiners the power to make law and pronounce a decision in any particular case without restraint of rule. *People ex rel. Robison v. Miner,* 68 Mich. 549, 37 N. W. 21, 24; *Yick Wo v. Hopkins,* 118 U. S. 356; *Baltimore v. Radecke,* 49 Md. 217; *State ex rel. Garrabad v. Dering,* 84 Wis. 585; *Matter of Frazee,* 63 Mich. 396; *Gundling v. Chicago,* 177 U. S. 183; *Austin v. Murray,* 16 Pick. 121; *People ex rel. Kuhn v. Common Council,* 70 Mich. 534, 38 N. W. 470; *Plymouth v. Schultheis,* 135 Ind. 339, 35 N. E. 12; *Ex parte Jackson,* 45 Ark. 158, 164; *Ex parte Cox,* 63 Cal. 21; *Dunham v. Hough,* 80 Mich. 648, 45 N. W. 497; *Elkhart v. Murray* (Ind.) 75 N. E. 593. (2) In that it confers power to decide the reputation and property rights of respondent without notice or hearing to the person or corporation whose rights are injuriously affected. *Dietz v. Neenah,* 91 Wis. 422; *Schiltz v. Roenitz,*

86 Wis. 31; *Dullam v. Willson,* 53 Mich. 392, 19 N. W. 112; *Grand Rapids v. Powers,* 89 Mich. 94, 50 N. W. 661; *Lathrop v. Racine,* 119 Wis. 461; *State v. Brown,* 37 Wash. 97, 106, 68 L. R. A. 889; *State ex rel. Wood v. Goldstucker,* 40 Wis. 124; *Miller v. Jones,* 80 Ala. 89; *King v. Hayes,* 80 Me. 206, 13 Atl. 882. (3) In that it provides that the enumerated powers are conferred on a board, a majority of whom are required to be members of a college or named society and all of whom may be selected by the governor from persons recognized by that college or society. *Black v. State,* 113 Wis. 205, 219, 226; *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 549; *State v. Whitcom,* 122 Wis. 110; *Clark v. Board,* 24 Iowa, 266; *State v. Garbroski,* 111 Iowa, 496, 56 L. R. A. 570; *Rathbone v. Wirth* (N. Y.) 45 N. E. 15; *Fordyce v. State ex rel. Kelleher,* 115 Wis. 608; *Wright v. Hart,* 182 N. Y. 330, 75 N. E. 404. (4) In that it denies the right to study dentistry to persons not possessing qualifications therein mentioned, which requirements cannot be upheld under the police power. *Bessette v. People,* 193 Ill. 334, 56 L. R. A. 562; *Lawton v. Steele,* 152 U. S. 133; *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530; *State ex rel. McKell v. Robins,* 71 Ohio St. 273, 73 N. E. 470; *Allgeyer v. Louisiana,* 165 U. S. 578, 589; *Butchers' Union Co. v. Crescent City Co.* 111 U. S. 746; *Matter of Jacobs,* 98 N. Y. 98; *Gough v. Dorsey,* 27 Wis. 119; *Milwaukee Industrial School v. Milwaukee Co.* 40 Wis. 328.

MARSHALL, J. It is provided by ch. 366, Laws of 1905, that "the place of trial of all actions authorized to be brought against the state or any of the state officers in their official capacity shall be Dane county." Counsel concede that whether error was committed in denying the motion to change the place of trial turns on the solution of these points:

First. Is a *certiorari* proceeding an action? Second. Are members of the State Board of Dental Examiners state officers within the meaning of the law under consideration?

1. It is not entirely without difficulty that proceedings commenced by original writs were classified with reference to the two kinds of judicial remedies under the Code. The old system which was superseded thereby furnished some aid in the matter. By such aid, the general scheme of the statutes and the procedure required, a conclusion was logically reached that they should be regarded as actions. *Paine v. Chase,* 14 Wis. 653; *State ex rel. Green Bay & M. R. Co. v. Jennings,* 56 Wis. 113, 14 N. W. 28; *State ex rel. Manitowoc v. Manitowoc Co.* 59 Wis. 15, 16 N. W. 617; *State ex rel. Drury v. Lincoln,* 67 Wis. 274, 30 N. W. 360; *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672, 70 N. W. 300; *State ex rel. Rice v. Chittenden,* 107 Wis. 354, 83 N. W. 635; *State ex rel. Durner v. Huegin,* 110 Wis. 189, 222, 85 N. W. 1046; *State ex rel. Court of Honor v. Giljohann,* 111 Wis. 377, 384, 87 N. W. 245; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 58, 98 N. W. 954. True, that is not in harmony, strictly, with the letter of the Code. The remedies afforded by original writs are commonly of a civil nature, and sec. 2629, Stats. 1898, provides that a civil action shall be commenced by summons. Construed strictly that does not apply to a remedy invocable only by a judicial writ.

By sec. 2594 all judicial remedies are divided into actions and special proceedings. By sec. 2595 the former includes every "proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." By sec. 2596 the latter includes every other proceeding. Actions are subdivided into two classes, criminal and civil. Sec. 2597. The former includes every action prosecuted by the state as a party against a person charged with a public offense for the punishment thereof. Sec. 2598. The latter includes all others (sec. 2599), whether prior to the Code denominated actions at law or suits in equity, the distinctions in that regard and the forms in respect thereto being abolished and wholly superseded by

the civil action of the Code. Sec. 2600. The appeal statutes were framed in harmony therewith, the right of appeal as to a final determination of an action being conferred separate and distinct (sec. 3047) from the right of appeal as to intermediate orders, orders in special proceedings, and others (sec. 3069). A proceeding instituted by the issuance of one of the original writs mentioned must fall within those denominated actions. A writ of error to review, on the merits, a final judgment is in no sense a proceeding in an action, but is a new proceeding to review a final judgment rendered in an action in a court different from the one issuing the writ. *Paine v. Chase, supra.* The writ of *habeas corpus* is used to institute a proceeding for the vindication of the right to personal liberty. *State ex rel. Durner v. Huegin, supra.* Such a proceeding is not in a prosecution, but "is a new suit to enforce a civil right." WAITE, C. J., in *Ex parte Tom Tong,* 108 U. S. 556, 2 Sup. Ct. 871. Likewise the issuance of a writ of *certiorari* is essentially the commencement of a proceeding independent of that to be reveiwed. It is a remedy afforded by law to enable one who has been, or may be, injured by a determination of a judicial nature, good merely in form, but void for jurisdictional error to vacate it. It is in many cases the only remedy by which the right of the matter can be directly vindicated.

The procedure in all cases above mentioned must necessarily assimilate to that of actions, strictly so called, not to that of special proceedings. *State ex rel. Risch v. Trustees, supra.* There must be papers in the nature of pleadings whether they are called such or not. There must be a trial, which in many cases may include the solution of questions of fact. The issues are commonly placed on the calendar for trial, in all respects like those in other actions. The rules of court expressly provide therefor in *certiorari* actions, and recognize that they should be brought to a hearing in the circuit court upon the usual notice of trial. Sec. 4, rule XXX, Circuit

Court Rules. The proceeding is closable only by a judgment.

The court established the practice as indicated by a series of decisions. At the outset it was said that the sufficiency of the writ and the return should be tested by ordinary rules and proceedings applicable to pleadings. *State ex rel. Green Bay & M. R. Co. v. Jennings, supra.* That was said to be the rule, the proceeding being a suit. That is hardly accurate, since a suit, strictly speaking, is unknown to the Code. The idea in mind was that the fact that at common law the proceeding was denominated a suit, is to be remembered in connection with the substitution by the Code of the civil action for all common-law remedies denominated suits or actions. In *Starkweather v. Sawyer,* 63 Wis. 297, 300, 23 N. W. 566, it was said that a *certiorari* proceeding must be closed by a judgment. Later it was held that such a final determination is a judgment under the appeal statute. *State ex rel. Court of Honor v. Giljohann, supra.* Still later it was held that the proceeding is an action under the cost statute. *State ex rel. Risch v. Trustees, supra.* In *State ex rel. Durner v. Huegin, supra,* it was stated that before the Code an original writ was issued to commence a proceeding denominated a suit, and that the abrogation of suits and the substitution therefor of the action of the Code made such a proceeding, though not technically within the meaning of sec. 2597, an action, but such clearly within the broad meaning of sec. 2595, which must be deemed to refer to all remedies displaced by the civil action of the Code. That was restated in *State ex rel. Risch v. Trustees, supra,* where the language formerly used was somewhat amplified, it being said that the constitutional grant of authority to use the common-law writs carried with it, necessarily, the right to use them with the functions applicable thereto before the Code, which included the commencement of proceedings called suits; that the abrogation of suits and substitution in place thereof of a civil action could

not be recognized as changing the function of the writs as preserved by the constitution.

It follows that the issuance of an original writ is to be deemed to all intents and purposes the commencement of an action in the statutory sense, characterized by proceedings in the nature of pleadings, by issues, by the trial thereof, by a judgment with the incident of costs to the prevailing party, and the right of appeal.

In the above discussion we have treated the writ of *certiorari* as one of several original writs necessarily governed by the same rules. All of our decisions on the subject are in harmony therewith, and with authorities elsewhere. *Hendrix v. Kellogg,* 32 Ga. 435, 437; *Kohl v. U. S.* 91 U. S. 367; *Marion v. Ganby,* 68 Iowa, 142, 26 N. W. 40; *Holmes v. Jennison,* 14 Pet. 540; *Coston v. Coston,* 25 Md. 500, 507; *State v. Newell,* 13 Mont. 302, 304; *Hartman v. Greenhow,* 102 U. S. 672; *American Exp. Co. v. Michigan,* 177 U. S. 404, 20 Sup. Ct. 695; *Roadhouse v. Briggs,* 194 Ill. 435, 62 N. E. 778; *McBane v. People ex rel. Stout,* 50 Ill. 503; *Weston v. Charleston,* 2 Pet. 449; *People v. Clarke,* 9 N. Y. 349; *Cohens v. Virginia,* 6 Wheat. 264, 409; *Ex parte Miller,* 129 Ala. 130, 30 South. 611.

2. The term "state officers," used in the act under consideration, is sometimes construed as meaning only heads of the executive departments of the state elected by the people at large, such as governor, lieutenant governor, state treasurer, secretary of state, attorney general, and the like. In its more comprehensive sense it includes every person whose duties appertain to the state at large. The exact sense in which the term is used in any particular law must often be determined by ordinary rules for judicial construction. One of the cardinal rules thereof is, a meaning should not be attributed to words leading to absurd consequences. That at once, we should say, narrows the meaning of the term here to its more restrictive and ordinary signification. Otherwise, it would

apply to all actions wherever commenced in the state, regardless of the residence or principal place of abode, or official residence of the parties, in the event of the defendant being sued in his official capacity and his possible field of operations extending to the whole state. That would include every member of each of the numerous legislative creations called boards or commissions, every notary public, every state game warden and his deputies, and a multitude of other officers. Such a construction would turn a law, evidently intended to prevent unnecessary disturbance of public affairs, into one of an opposite character.

The state officers, heads of departments who have their official residence at the capitol of the state and who are expected to keep open office there during business hours and, generally speaking, to be there themselves, might be greatly prejudiced, and the public welfare as well, by their being required to attend trials of actions in their official capacities in distant parts of the state. The reason of the law seems to strictly confine it to such officers. To extend it further would necessarily advance its boundaries so as to include all persons to whom the term in any reasonable sense could apply. So we reach the conclusion that the legislature used it in its restrictive sense,—the one which commonly occurs to the mind when the words are spoken. Courts elsewhere, in similar circumstances, have said that, as a general rule, it applies only in that sense. *State ex rel. Stearns v. Smith,* 6 Wash. 496, 33 Pac. 974.

Appellants' counsel question the right of respondent to the remedy accorded, insisting that the latter is neither interested in nor a party to the proceeding complained of. If the premises are correct the conclusion itself cannot well be questioned.

Obviously the very life of respondent, as to its dental department, depends upon whether its certificates of graduation, in themselves, constitute an efficient password, so to speak, at the door which the law-making power has seen fit to erect between the outside and the inside of the dental profession. It

is no answer to respondent's position to say that a graduate is not by a sentence of nonreputability passed upon his *alma mater* precluded from approaching the bar of the official board on his merits, and, by showing actual qualifications for the profession of dentistry, obtain the coveted license. A college cannot exist without revenue. It cannot have revenue without patrons. It cannot have patrons unless it can send its finished students out, in due course, to enter into the activities of the profession with the requisite character to secure admission thereto on that alone. It cannot have essential competency in that regard, unless it possesses in fact, and in the judgment of the official state board, reputability; character as an institution of learning satisfactory to such board. The board is the sole judge in the matter, subject to a revision of its decision for reasonableness. It holds in its hands, under the present system, the destiny of the college. In case of the latter having done all that is reasonable to satisfy the legislative idea of reputability, whether it shall "live or die, survive or perish," is within the province of the appellants to determine, subject to such review of its decision as the law of the land may afford, in case of an abuse of its authority either in respect to the standard required or failure to reasonably observe established rules, precedents, and methods in arriving at its conclusion. *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 88 N. W. 587.

From what has been said we need not spend much time supporting disaffirmance of the proposition that respondent had no interest in the decision of the board as to its reputability. Whether we view the case upon the theory that the decision occurred incidental to the primary matter of passing upon applications for licenses, or the theory that the primary matter was the status of the college, makes no difference with the final result as we shall see. If the action of the board was a mere incidental decision, nevertheless the college was an interested party on principle and under the decisions of this court

in the case cited. It was there held that such a decision may be regarded as settling the status of the college until subsequent events shall reasonably require re-investigation of the matter. So the incidental decision here, if that be its character, had all the force, as regards injurious effects upon the college, of one rendered in a direct proceeding against it.

The failure of the premises upon which the logic of appellants' counsel rests involves a concession, it seems, that if the decision of the board was one which it might properly have made under any circumstances, it was subject to be reviewed upon *certiorari,* if respondent was competent to sue out the writ. It is not an absolute essential to competency in such cases that the petitioner should be a party to the record in the proceeding sought to be reviewed, nor necessary that he should be the party wronged, as regards a proper citation being essential to jurisdiction of the subject matter. A good illustration of that is found in *State ex rel. Graef v. Forest Co.* 74 Wis. 610, 43 N. W. 551, where *certiorari* at the instance of a taxpayer—injuriously affected by the determination of his county board changing the boundaries of two towns and organizing a new one—was sustained to test the validity of the board's action. Analogous to that case are *State ex rel. Wood v. Goldstucker,* 40 Wis. 124, and *State ex rel. Hallauer v. Gosnell,* 116 Wis. 606, 93 N. W. 542.

Authorities may readily be found to the effect that no one is entitled to a writ of *certiorari* to review a proceeding to which he is not a party, but a careful examination thereof will show that they do not go to the extent of limiting the use of the writ to parties to the record. The essential of competency to use the writ, if the court in its discretion sees fit to permit it, is that the applicant is a party to the record or a party, in that the decision is directed against him or his property, or a party constructively, in that the enforcement of the decision would involve special, immediate, and, in effect at least, a direct injury to his interests. In such circumstances, if he has

no other remedy reasonably available, the court may in its discretion, and must if in the exercise of sound discretion it ought to, give him the use of its original writ of *certiorari* to vindicate his right. The law is quite comprehensively stated in respect to the matter in 4 Ency. Pl. & Pr. 167, thus:

"The writ will not be issued on the application of one who has no ground of complaint, whether the applicant therefor is a party to the proceedings or not. Where, however, the applicant for the writ has been actually aggrieved by the proceedings of which he complains, and the proceedings are reviewable by *certiorari*, he is entitled to the writ."

"In considering whether or not the person is the proper party to apply for the writ, the court frequently exercises its discretion."

"The court should be satisfied before allowing or acting upon the writ, that the issuance of the writ is essential to prevent some substantial injury to the applicant; and it devolves upon the applicant to show his right to prosecute the writ."

"The applicant must have grievances of his own, and must not base his right to the writ on the ground that the rights of others have been infringed."

The following are good applications of the foregoing stated doctrine: *People ex rel. Sheridan v. Andrews*, 52 N. Y. 445; *People ex rel. Youmans v. Wagner*, 7 Lans. 467; *Palmer v. Circuit Judge*, 83 Mich. 528, 47 N. W. 355; *Strong v. County Comm'rs*, 31 Me. 578; *People ex rel. Allen v. Knowles*, 47 N. Y. 415; *Stone v. Miller*, 60 Iowa, 243, 14 N. W. 781; *Groves v. Richmond*, 53 Iowa, 570, 5 N. W. 763; *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337; *Miller v. Jones*, 80 Ala. 89; *Tallon v. Hoboken*, 60 N. J. Law, 212, 37 Atl. 895; Wood, Mandamus (2d ed.) 151.

It may be that some of the cases cited are on rather extreme lines. Certain it is that some of them go much further than is necessary for the purposes of this one. We are not unmindful that the writ of *certiorari* is not issuable for purpose of reviewing the exercise of legislative discretion (*People ex rel.*

Jamaica v. Queens Co. 131 N. Y. 468, 30 N. E. 488), or a mere administrative matter (*State ex rel. Anderson v. Timme,* 70 Wis. 627, 36 N. W. 325), or proceedings in form judicial of a mere usurper (*State ex rel. Schaefer v. Schroff,* 123 Wis. 98, 100 N. W. 1030).

The true rule deducible from the authorities is this: In the exercise of its discretionary authority a court of general jurisdiction,—upon the application of any party to a judicial proceeding, or person interested in a proceeding of a judicial or *quasi*-judicial nature, because of some special or peculiar injury to himself in person or property, for which he had no other reasonably available remedy,—may grant the use of its writ of *certiorari* to review the same for jurisdictional error, and upon reasonably clear *prima fdcie* showing in that regard discretionary authority should be so exercised. This treatment, in the main, relates only to injury where the proceeding is not against the person or property of the applicant for the writ. It does not include to the fullest extent the right to the writ where the proceeding is direct,—those cases where citation to the person in some reasonable way is requisite to jurisdiction of the subject matter.

Counsel for respondent go further than to merely answer the contention of counsel for appellants on the proposition that the writ was improvidently issued because the decision challenged was merely incidental to passing on applications for licenses, and that the college had no such interest in the matter as to warrant the court in permitting a judicial review thereof in the manner attempted; claiming that the decision did not relate solely to a mere incidental matter involved in an issue between the board and applicants for licenses, but was in the nature of a proceeding directly against the college itself; a decision intended to have a general effect, and that as the proceeding was *in rem,* the college, as the possessor of the *res,* was not only a proper but a necessary party, rendering

essential some reasonably efficient notice to it and opportunity to be heard, as a condition of jurisdiction of the subject matter.

We incline to the view that the decision of the board cannot be construed as a mere incidental conclusion. The proceedings leading up to it strongly, if they do not conclusively, indicate that, in form and purpose, they were direct, the people at large being on the one side and the college, or it and those holding its certificates of graduation, on the other. There were applications for licenses on file, but they had not been taken up for consideration prior to the making of the decision, nor were they at the time thereof, so far as appears, specially or even incidentally under consideration. No notice was given to the applicants, as was done on former occasions, to appear and make proof. It does not appear that the applications in hand were specially thought of. The attention of the board was directed solely to the situation of the students who had not yet received their diplomas and the attitude of the college in respect thereto. So little attention was paid to the applications for licenses, that the matter was not called to mind when the return was made and it became necessary, in order to make a complete showing in the return, to bring in the facts in that regard by amendment. The entire history of the matter, as indicated in general terms by the statement, and as will appear in more detail hereafter, shows pretty clearly that at least the primary matter involved was the character of the college. The decision went directly against it and incidentally, if at all, against pending or anticipated applications for licenses. Doubtless, whether the proceedings were directly against the college by itself, or against it and applicants for licenses as uniting two primary matters, is not material since the rule as to notification to the former and opportunity to be heard before condemnation would be the same in one case as in the other.

The foregoing leads to the interesting question of whether

notice to the college was necessary to jurisdiction of the subject matter by the board. That the decision affects its material interests has been sufficiently shown. If that resulted from a mere exercise of legislative discretion, it would not be remediable by *certiorari,* as we have seen. Neither would it be if it resulted from the reasonable exercise of judicial discretion, or a decision judicial in form, which was wholly a usurpation, *i. e.* one which the board would not have jurisdiction to make under any circumstances, waiving constitutional and other questions. It has been suggested that the latter is more nearly its character than any that can be suggested; that it was a mere "fulmination" which did not and could not injure the college because the board had no jurisdiction, under any circumstances, to act generally upon the subject of the status of the college. That suggestion, if any going to the character of the decision, is at this point entitled to consideration.

Manifestly, if the board had any function in the matter it was of a judicial nature. That was distinctly held, in conformity to elementary principles and decisions in similar cases, in *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 88 N. W. 587. Every court that has passed upon a similar law has so held, so far as we can discover. The following language in *Williams v. Dental Examiners,* 93 Tenn. 619, 27 S. W. 1019, is in line with expressions of this court:

"It is evident that it was the purpose of the legislature to lodge it in the board of examiners created by the act. . . . In performing their duties, the board is exercising a *quasi*-judicial function, and, so long as it does not act arbitrarily and illegally, its determination cannot be coerced."

In *People ex rel. Sheppard v. Dental Examiners,* 110 Ill. 180, the court spoke likewise, as follows:

"These questions of fact," relating to reputability, "are, by the act, submitted to the decision of the board,—not in so many words, but by the plainest and most necessary implication. Their action is to be predicated upon the existence of the requisite facts, and no other tribunal is authorized to in-

vestigate them, and of necessity, therefore, they must do so. The act of ascertaining and determining what are the facts, is in its nature judicial. It involves investigation, judgment, and discretion."

To the same effect are *State ex rel. Granville v. Gregory,* 83 Mo. 123; *State ex rel. Powell v. State Med. Exam. Board,* 32 Minn. 324, 20 N. W. 238; *France v. State,* 57 Ohio St. 1, 47 N. E. 1041. All courts which have considered the matter have rejected the ideas sometimes advanced that such delegations of authority contravene the constitution vesting legislative authority in the senate and assembly and judicial authority in the courts. The authority conferred is neither legislative nor judicial in a constitutional sense. It is authority to determine questions of fact required to be solved by the exercise of judgment preliminary to performance of purely administrative duties. The constitutional authority vested in the legislature appertains wholly to the making of law. That vested in such boards as we have here appertains wholly to the administration of law. The judicial power vested by the constitution in courts relates to that administration of remedies for remediable rights formerly exercised exclusively by courts. The discretionary, denominated *quasi*-judicial, authority vested in such boards as the one in question is a necessary incident of purely administrative duties. The two, in many branches of civil government, are inseparable, and have no similarity to authority exercisable by courts through the instrumentality of judicial remedies. The following citations are but a few which might be mentioned where this subject has been treated in cases similar to the one in hand: *State v. Heinemann,* 80 Wis. 253, 49 N. W. 818; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561; *State v. Dent,* 25 W. Va. 1; *Dent v. West Virginia,* 129 U. S. 114, 9 Sup. Ct. 231; *Reetz v. Michigan,* 188 U. S. 505, 23 Sup. Ct. 390; *France v. State,* 57 Ohio St. 1, 47 N. E. 1041; *State v. Harmon,* 31 Ohio St. 250; *Elmore v. Overton,* 104 Ind. 548, 4

N. E. 197; *Ex parte Whitley,* 144 Cal. 167, 77 Pac. 879; *Los Angeles Co. v. Spencer,* 126 Cal. 670, 59 Pac. 202; *State v. Hathaway,* 115 Mo. 36, 21 S. W. 1081; *Flournoy v. Jeffersonville,* 17 Ind. 169; *Wilkins v. State,* 113 Ind. 514, 16 N. E. 192; *State ex rel. Burroughs v. Webster,* 150 Ind. 607, 50 N. E. 750; *State Board of Health v. Roy,* 22 R. I. 538, 48 Atl. 802; *People v. Hasbrouck,* 11 Utah, 291, 39 Pac. 918.

May the board, in anticipation of necessity for the exercise of its administrative functions, and upon being invoked to do so by the party on the one side chiefly interested (the college), investigate and pass judicially upon its reputability, establish its status for purposes past and future, subject to reasonable revision of the matter upon any change occurring fairly calling therefor? True, there is no express delegation of such authority in the written law, there was no express delegation of such authority in the law prior to the act of 1903, nor to pass upon the matter of reputability at all, nor is there in any of the many similar laws in other states, where it has been held that the latter authority exists by necessary implication. As stated by the Illinois court:

"The establishment of the reputability of the college seems to be one of the primary duties of the board. It is essential to the exercise of its administrative functions. It is the sole tribunal to determine the matter. Its determination once made is *prima facie* binding. It is binding absolutely in all courts and places, subject to review for jurisdictional error until changed reasonably by the board itself."

The rule applies that "when the existence of a person, a personal relation, or a state of things is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised, from the nature of the subject in question." Those principles were all definitely laid down in *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 88 N. W. 587. The law as there construed, not only does not

require but does not permit the college to be challenged, as regards its reputability, upon every occasion of the board being called upon to perform its administrative function of issuing a license to one of the former's graduates. It contemplates that the status of the institution being once regularly established the decision in that regard will be reasonably permanent, so that applicants for licenses, and persons desiring to be matriculated at the college as well, can rely thereon, conditions not efficiently changing. It would seem that to confer on the board jurisdiction so that, upon every occasion of its administrative function being set in motion, regardless of its having previously determined the status of the institution involved, and no change in the meantime, the reputability of such institution may be inquired into,—would so shock the reason as to cause hesitancy, at least, to believe the legislature could so have intended.

Our conclusion is that under the present system of legislative regulation of the profession of dentistry and of the character of educational institutions preparing candidates therefor, the status of such an institution, as to whether reputable or not, is a matter of public importance in which the candidates holding certificates of graduation and the institution and the public at large are independent parties, and the official board is the sole tribunal to adjudicate in regard thereto; and that it may be set in motion, respecting the matter, by an application for a license, or may on its own motion, in anticipation of the fact becoming essential to the execution of its administrative functions, or for the benefit of all whom it may concern, move in such matter, or it may be set in motion by the college and required to so act, to the end that the corporation may act advantageously and justly to the public in soliciting patronage and in sending its graduates out on the pretense, evidenced in the usual way, of their being qualified to enter successfully into the profession of dentistry. Whenever the thing denominated status is a matter of public importance by principles of common law or by the letter or spirit of the

written law, such as the condition of marriage, citizenship, parentage, residence, legal settlement, and many other matters that might be mentioned, the question in respect thereto is a legitimate matter for judicial determination by a tribunal having jurisdiction of the *res*. Proceedings of that sort are regarded as *in rem*, the same in all respects as if the thing were of a tangible character. The whole world, so to speak, is regarded as a party. The person directly affected is deemed to be so specially interested as to be entitled, under constitutional guaranties, as regards due process of law, the equal protection of the laws, and the general principles of free government, to some reasonable opportunity to be heard. There are many cases on this subject. The following are a few of them: *State ex rel. Kickbush v. Hœflinger*, 35 Wis. 393; *State ex rel. Atkinson v. McDonald*, 108 Wis. 8, 84 N. W. 171; *Spratt v. Spratt*, 4 Pet. 393; *McCarthy v. Marsh*, 5 N. Y. 263; *Cabot v. Washington*, 41 Vt. 168; *Hood v. Hood*, 110 Mass. 463; *Smith v. Smith*, 13 Gray, 209; *Pittsford v. Chittenden*, 58 Vt. 49, 3 Atl. 323; *Ross v. Ross*, 129 Mass. 243. Judge Elliott in his work on Practice (vol. 1, §§ 245, 246) treats this matter at considerable length, and states the general proposition thus:

"Where a court is empowered to investigate the law or the facts of a particular matter respecting the status of a person, or of a thing, it necessarily acts in a judicial capacity and its judgment or decree is the product of judicial power. In determining the status of a person, where by law it is required to investigate and determine that question, the court exercises judicial functions. . . . With the *res* before it, the capacity to proceed, and a right or duty to decide, the decision must, certainly, be something more than an impotent declaration or a mere collection of meaningless words. The denial that there is power in a decision in such a matter is an affirmation that the court's proceeding is idle,—in truth a mere shallow pretense,—but the concession that there is vitality in it is an affirmation that it is entitled to faith and credit as the adjudication of a court."

That language, as will be seen, was used with reference to judicial action by courts, but, obviously, it applies the same wherever the action is of a judicial nature. It applies necessarily in a case of the exercise of *quasi*-judicial authority as well as judicial authority, strictly so called, to the extent of the binding effect of any *quasi*-judicial decision.

That supports the position of counsel for respondent,—that regarding the proceedings *in rem,* as they essentially were, the college was an indispensable party thereto, and reasonable citation to it and opportunity to know the precise points to be investigated, to meet the evidence produced against it with some reasonable semblance of a judicial inquiry, and to produce evidence in its own behalf according to the ordinary course for such proceedings, was essential to jurisdiction to make any determination whatever.

It would seem that the proposition stated needs no further discussion. Granted that the proceeding was *in rem,* it follows that notice and opportunity to the possessor of the *res* should have been given as claimed. One of the fundamental principles of our system of government is that no one shall be condemned, as to his person or property, without due process of law. That is well within the letter, and, manifestly, within the spirit of the fourteenth amendment to the national constitution, with our constitutional guaranty as to a firm adherence to the fundamental principles of justice, sec. 22, art. I, Const. of Wis., and that comprehensive, basic guaranty making the constitution as a whole a recognition and pledge for the preservation of the rights to life, liberty, and the pursuit of happiness. Sec. 1, art. I, Const. of Wis.

Due process of law does not mean merely according to the will of the legislature, or the will of some judicial or *quasi*-judicial body upon whom it may confer authority. It means according to the law of the land, including the constitution with its guarantees and the legislative enactments and rules duly made by its authority, so far as they are consistent with

constitutional limitations. It excludes all mere arbitrary dealings with persons or property. It excludes all interference not according to the established principles of justice, one of the most familiar of them being the right and opportunity for a hearing, to meet opposing evidence and oppose with evidence, according to the established principles of fair investigation to determine the justice of the case, before judgment affecting personal or property rights shall be pronounced. *Siefert v. Brooks,* 34 Wis. 443; *State ex rel. Flint v. Fond du Lac,* 42 Wis. 287. In the first case cited, in the language of DIXON, C. J., the court stated the doctrine thus:

"If the whole proceeding be *ex parte* or without notice, where notice should be given, or if such be the character of the determinatory act, the law condemns it *in toto,* and disregards it from the beginning. That every man is entitled to his day in court, and must have it, and cannot be affected in his person or his property, unheard or without the privilege secured to him of appearing or being represented in his own defense, if he so desires, is a maxim the force and importance of which every good lawyer appreciates, and one which no court ever surrenders."

These circumstances are essential to jurisdiction in all actions *in rem:* 1. The *res* must be within the jurisdiction of the court. That is satisfied in case of tangible things by their physical location within the scope of the court's authority. It is satisfied in case of intangible things, such as status, by jurisdiction of the person whose relations to the public are to be established. 2. There must be personal notice to the possessor of the *res* and opportunity for him to have his day in court, where the statute requires it, and also in case of its being silent on the subject, when such notice can reasonably be given, and in other cases there must be reasonable constructive notice.

From the foregoing it seems quite clear that whether we view the position of the board as that of having decided on the reputability of respondent incidental to the exercise of purely

administrative duties, or having determined the status of the college in a general way as in a direct proceeding solely *in rem,* or having determined the matter as involving two primary matters, still it was competent for the court to permit the use of its writ of *certiorari* for a review of the decision to some extent at least; that in the first situation notice to the college was not essential to jurisdiction of the subject matter, so the writ could reach only error proper to be considered irrespective thereof; that in either of the other two the legitimate scope of the inquiry included that which would be excluded in the first situation and all included in it as well. The claim of counsel as to such scope, suggested on the argument, is somewhat extraordinary, especially in view of the course of decisions in this state, but it was made with such confidence as to challenge somewhat more than a mere passing notice.

It is said that the writ of *certiorari* under the constitutional grants to circuit courts should be given the full scope of a writ of error, supplementing the appeal statute where necessary to reach the real justice of the case, all errors assigned, whether jurisdictional or judicial, being examined, and if it is thought that such extraordinary scope cannot be recognized, though the writ has been denominated in the cause one of *certiorari,* it should be deemed to be one of those new writs which it has been suggested a court may properly issue where the ends of justice cannot otherwise be attained.

In support of the proposition stated, our attention is directed earnestly to this language in sec. 8, art. VII, of the state constitution:

"Circuit courts shall have . . . appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. They shall also have the power to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari,* and all other writs necessary to . . . give them a general control over inferior courts and jurisdictions."

That, it is argued, grants appellate jurisdiction and by necessary implication the right of review as upon an appeal.

Counsel fail to distinguish between appellate jurisdiction and the right of appeal. The former only is granted by the constitution, the latter is a mere legislative creation. The legislature is supreme in the matter. It may grant the right of appeal from some inferior courts and not from others, or from courts only, or from courts and tribunals exercising *quasi*-judicial authority as well; or may grant the right in some cases and not in others, and having granted it take it away. Without legislative action creating the right in any given case in plain language, or by necessary implication, it would be usurpation for the court, on the mere faith of its constitutional grant of appellate jurisdiction, to entertain an appeal. The appellate power of circuit courts must remain in abeyance, except just in so far as it has been, or shall be, given vitality by legislative authority. *Mitchell v. Kennedy,* 1 Wis. 511; *Lancaster v. Barr,* 25 Wis. 560; *Eureka S. H. Co. v. Sloteman,* 67 Wis. 118, 30 N. W. 241; *State ex rel. Tewalt v. Pollard,* 112 Wis. 232, 87 N. W. 1107.

The constitutional provision in question was taken *verbatim* from Michigan, where the holdings before and since its adoption are in harmony with our own. *People ex rel. Jeschly v. Police Justice,* 7 Mich. 456; *Demaray v. Little,* 17 Mich. 386; *Maxfield v. Freeman,* 39 Mich. 64; *Kundinger v. Saginaw,* 59 Mich. 355, 26 N. W. 634; *Sullivan v. Haug,* 82 Mich. 548, 553, 46 N. W. 795; *Messenger v. Teagan,* 106 Mich. 654, 64 N. W. 499. CHAMPLIN, C. J., in *Sullivan v. Haug, supra,* said:

There is no "inherent right to appeal from a judgment of an inferior to a court of superior jurisdiction for the purpose of securing a second trial upon the merits. The right of appeal is and always has been statutory, and does not exist at common law. It is a remedy which the legislature may in its discretion grant or take away . . . and unless the statute . . . provides for an appeal . . . none can be taken."

But it is said that the constitutional grant of "general control over inferior jurisdictions," such as that of boards like

the one in question, with the right to issue certain writs, including that of *certiorari,* "and all other writs necessary to carry into effect their orders, judgments and decrees," is sufficient to afford circuit courts power to review proceedings of an inferior tribunal to the fullest extent. Here comes in the idea that if some one of the writs mentioned is not appropriate for a full review the court may invent a new one. We are not unmindful that the learned chief justice who wrote the opinion in *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 515, suggested that such power of invention existed as "a secret in law," quoting from Lord COKE. That suggestion has led to more than one urgent appeal to this court, and probably others to circuit courts, to give vitality to such secret, but without success so far as we are aware. If there be such a secret, the fact that during the more than a century which has elapsed since Lord COKE so suggested, it has never been called into requisition, renders strikingly significant the inventive genius of the early architects of the common-law system. The so-called secret has slept so long as to raise doubts as to whether the framers of the constitution had in mind in using the term "all other writs," etc., any others than those that were then known, though not mentioned specifically, which were appropriate to render efficient the jurisdiction conferred. Certainly, as remarked in *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 615, 79 N. W. 1081, those which are mentioned are sufficient for all ordinary situations, liable to occur where the constitutional authority of superintending control may be called into activity. No event has heretofore occurred, so far as appears from the records of the court, where constitutional instrumentalities, without resort to invention, have not been entirely adequate for the supervisory control of inferior courts and jurisdictions. What may have appeared some time, as is the case now, to be a need for some new writ or a new function for an old one, originated in misconception of the jurisdiction contemplated by the term "general control

over inferior courts and jurisdictions" as it was understood by the framers of the constitution.

The whole scope of superintending control is, with reasonable accuracy, defined by the quoted words of the constitution. The supplementary grant of authority to issue certain and other specified writs does not enlarge it in any particular. As said in *Att'y Gen. v. Railroad Cos.*, while the use of certain writs was granted to this court in aid of, and for jurisdiction as well, the grant to the circuit courts is an appurtenance to jurisdiction "with power to put the writs to all proper uses;" that is to say: each writ, it was contemplated, should be recognized as having its ordinary function according to the course of the common law, as a mere instrumentality in the exercise of jurisdiction granted independently thereof. It will be observed that the writ of error, the one best known and most commonly used under the old system,—the one appropriate to appellate jurisdiction,—was not mentioned in the grant of authority to circuit courts. It was not appropriate to the jurisdiction of superintending control. The function thereof, as regards the circuit court, was rendered unnecessary by the grant of appellate jurisdiction with legislative power to make the same active in its discretion. It is elsewhere held under a similar statutory system, and the one upon which ours was mainly modeled, that the writ of error cannot be used by a circuit court. That approved would answer the suggestion made by counsel at the bar that jurisdiction in that regard exists as to our circuit courts and should have weight in determining the scope of authority exercisable at the circuit in this case, as to deciding the cause upon the merits. However, there is no need to determine that question here, though it might well be said in passing that the records furnish no precedent for the use of a writ of error by a circuit court.

The exact scope of the jurisdiction denominated "general control over inferior courts and jurisdictions" as to such

courts has never been, so far as we can discover, defined authoritatively. The term or its equivalent may be found in most of the written constitutions of the land. The idea came to us from the judicial system of England. Doubtless in giving to circuit courts an equivalent to the jurisdiction of the English courts of King's Bench, Common Pleas, Exchequer and Chancery, it was designed to construct a system with the three grand divisions, original jurisdiction, appellate jurisdiction, and jurisdiction for supervisory control, the latter being coextensive with the similar jurisdiction formerly exercised by the court of King's Bench. The system for circuit courts is similar, as regards their legitimate field of operation, to that for this court, within its sphere of action, the latter being conferred by the term "general superintending control." That was defined for the first time by this court, speaking through Mr. Justice WINSLOW, in *State ex rel. Fourth Nat. Bank v. Johnson, supra.* As to circuit courts it is fenced about, so to speak, by the functions, in the aggregate, of the ancient writs used to exercise it prior to the constitution, and preserved thereby for the same purpose. It was not given, as such authority was to this court, without instrumentalities essential to its activity, but was given with its appropriate "appurtenances," some being mentioned and others described generally. The scope of the former, as defined by Blackstone (3 Comm. ch. 4, p. 42), referred to as the most reliable source for authority on the question in *State ex rel. Fourth Nat. Bank v. Johnson,* is this: 1. To keep inferior courts within the boundaries of their authority. 2. To coerce the performance of duty where there is no other specific remedy. 3. To interfere for summary and speedy relief when necessary to protect the liberties of the subject. All apply, as will be seen, to matters within the field of jurisdiction. The scope of authority might perhaps be better understood with reference to present conditions if defined thus: 1. To prevent action, usurping jurisdiction, the writ of prohibition being the proper

judicial weapon, notwithstanding the legislative attempt to invade the constitutional authority of the court, on the subject, by sec. 3457, Stats. 1898. *State ex rel. Tewalt v. Pollard,* 112 Wis. 232, 87 N. W. 1107. 2. To quicken judicial action in case of unreasonable delay, to set the same in motion in case of refusal to act at all and to compel action within the limits of jurisdiction, in case of inexcusable excursion beyond such limits,—with the writ of *mandamus* as its appropriate "appurtenance." Formerly the writ of *procedendo ad judicium* was also usable in this field. The two performed substantially the same function but came from different courts, the former from that of the King's Bench and the latter from that of Chancery. Since the merger of jurisdictions in one court a single writ suffices for all situations, and the old chancery writ has become practically obsolete. 3. To reverse determinations void for jurisdictional error, the writ of *certiorari* being its proper instrumentality. It has been suggested, and is not now denied, that there may be other writs appropriate to this field of judicial activity. Suffice it to say that Blackstone, to whom all turn for definite information on the subject, does not mention any others, and it is difficult to see why any should be needed. These outlines of the great power of superintending control make the boundaries as definite as they can well be, except by the application of principles to cases as they arise. Experience will demonstrate that where the right is plain superintending control will reach far enough to suit the necessities of the case.

From the foregoing it will be seen that this case comes under the third subdivision of the circuit court's constitutional jurisdiction. The proper writ was sued for and obtained. It could perform its appropriate function and no other. That was limited to removal of the record, as to the matter in hand, into the circuit court for examination as regards jurisdictional error only. The writ has other functions, but none other invocable for the direct purpose of supervisory control. Upon

the certified record, and that alone, the tribunal's decision must stand or fall. The ordinary common-law function of the writ has not been extended in this state. The writ, as the framers of the constitution found it, was given to circuit courts solely in aid of, not for jurisdiction. Therefore, if the functions thereof were extended that would neither add to nor take from the jurisdiction of the court under its mere power of supervisory authority. It would still reach only jurisdictional matters.

Courts elsewhere, in some cases, and some text-writers as well, have said that the function of the writ of *certiorari* has been extended in recent years far beyond its ancient field. Counsel often contend for that view here, as was done in this case, with much persistence, assurance, and disposition to mildly, at least, criticise the court for holding to notions which are "unfitted to modern conditions" as it is said, quite unmindful, it seems, that "such persistent adherence" is only a sturdy maintenance of the plain limitations of the constitution. That this court has spoken often and in no uncertain terms on this question, so that it cannot reasonably be considered an open matter, is evidenced by the following: *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *State ex rel. Vilas v. Wharton,* 117 Wis. 558, 94 N. W. 359; *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048. A very pressing and futile appeal to this court to accord the writ of *certiorari* a wider scope than that of its common-law function was made in the last case cited, and the court upon due consideration of the matter responded:

"Boards of review up to the dividing line between what is jurisdictional error, error in the exercise of discretion, and judicial error, have ample opportunity to make erroneous decisions from which the aggrieved party has no opportunity for relief. If a remedy should be afforded in such cases the only source from which it can legitimately spring is legislative power. The court cannot give it by changing the scope of the common-law writ of *certiorari,* and has never attempted to."

We will now take up the two phases of jurisdictional error which the foregoing suggests in view of the assignments of error, assuming for now that the condemnation in question was incident to the performance of administrative duties. The first matter in order relates to the constitutionality of the law creating the board and defining its authority. Counsel's propositions on that we will take up and treat in their order.

First. "It is not a law, but an enactment attempting to confer upon the board power to make law and pronounce a decision in any particular case without restraint of rule."

That has been to some extent already answered. It is one thing to delegate power to make a law, and quite another to make one and delegate authority to a governmental agency to determine, in cases as they arise, whether the same is applicable thereto, or to administer the law in such cases, determining necessary questions of fact appertaining thereto. The act does not empower the board to prescribe the conditions upon which a person may practice the profession of dentistry; otherwise counsel's contention would have merit. The legislature prescribed such conditions, creating a board to execute its will, in that regard: to determine as to each candidate the existence or nonexistence of essential requisites, and in case of a favorable decision to award him evidence thereof. All there is which can properly be denominated "law" came from the legislature. The board cannot, without usurpation, do more than to execute the law. Legislation of that sort, in many fields of human endeavor and in relation to many matters, has been sustained and generally without controversy, as the numerous cases cited in this opinion will bear witness. "The true distinction," it is said, is "between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made." *Dowling v. Lancashire Ins.*

Co. 92 Wis. 63, 70, 65 N. W. 738; *Adams v. Beloit,* 105 Wis. 363, 368, 81 N. W. 869.

Second. "It is unconstitutional, as conferring power to decide on reputation and property rights without notice or hearing to the person or corporation whose rights are injuriously affected."

We assume that counsel do not claim that a grant of authority to decide upon the reputability of a college incidental to granting a license to one of its graduates, without notice thereto, would violate any constitutional provision. Certainly no citation referred to so holds, and we do not know of any. Upon principle it would seem none would be essential without legislative requirement. It was never supposed that, in the trial of an action respecting any particular primary matter, it was essential to jurisdiction that a person concerned in an evidentiary matter in respect thereto should be cited or allowed to appear as a party. There is no express grant of authority to the board to determine the status of a dental school by a proceeding *in rem* without notice, so far as we can discover. No legislative purpose to that effect can be read out of the law by reasonable implication, as in *Dietz v. Neenah,* 91 Wis. 422, 64 N. W. 299, 65 N. W. 500. The law confers jurisdiction to determine the matter, making no provision for proceedings to be followed. By necessary implication they must be reasonable. By fair construction that is embodied in the law as unmistakably as if words of the clearest import were used to express it. The court so held, in effect, in *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 88 N. W. 587. That requires procedure in harmony with fundamental principles of justice. Notice to the possessor of the *res,* actual in case of reasonable opportunity therefor, and constructive otherwise, with fair opportunity to appear and be heard, satisfies the essentials of due process of law, that of equal protection of the laws and other constitutional guaranties bearing on the question.

It is said that the statute leaves the reputability of the college absolutely to the judgment of the official board without any remedy for review whatever; that the moment a court undertakes to investigate the matter it will be met by implied prohibition. Not so, as we understand it. The law leaves the matter to the board, acting reasonably, the same as similar matters are commonly left to such agencies exercising *quasi*-judicial authority. It contemplates that the members of the board will proceed with the dignity and fairness commonly expected of tribunals exercising judicial or *quasi*-judicial authority; that they will act as a body; that they will act upon proof of some sort reasonably appropriate to the case and made a matter of record, not necessarily that they will in all cases act regardless of personal investigation, but that in case of reliance thereon the result of the investigation will be made a matter of record; that opportunity will be afforded to the party affected, as to the primary right involved, to know of and to rebut the evidence produced against him if he so desires. In short, that they will exercise their judicial function judicially and that their decisions will be open to review by the courts for jurisdictional error, including that involving the question of whether the basis for the decision indicated by the record constitutes reasonable ground therefor. That was distinctly held in *State ex rel. Coffey v. Chittenden, supra,* in harmony with decisions under similar statutes in this and other courts. Every suggestion on this branch of the case is fully covered in the one cited and in *State ex rel. Cook v. Houser,* 122 Wis. 534, 100 N. W. 964, and others heretofore cited.

Third. "It is unconstitutional in providing that the foregoing powers shall be conferred on a board, a *majority* of whom *shall* be members of a guild or society named, and *all* of whom *may* be selected by the governor from persons recommended by that guild or society."

This giving over, as it is said, of control of the official board

to a private association, largely interested in restricting membership in the profession so that it may determine who shall and who shall not belong thereto, transcends the uttermost limits of police power. Counsel's argument on that point suggests an inviting field for exploration, but we shall forego doing more in that regard now than is necessary to decide the proposition presented and make some general observations showing, as we think, that the danger from the supposed modern trend of legislation to invade private rights, is more imaginary than real in view of constitutional limitations.

It is not without warrant, in view of expressions sometimes found in the books, that the claim is made as regards some features of such regulations as the one we have here, that there is a dangerous tendency, without any constitutional check thereon, under the guise of police power to invade, if not supersede, some of the most cherished principles supposed to be firmly intrenched in the constitution. However, it is not believed but what the vigilant, independent, and courageous judiciary contemplated by the constitution, will prove amply sufficient to prevent any such calamity. One need not grow pessimistic in face of the numerous and peculiar legislative regulations of personal liberty, which seem to be thought expedient by the law-making power. The known necessity of charter restraints to prevent the people in their sovereign capacity from turning upon themselves in their individual capacities to the injury or destruction of natural rights, gave rise to written constitutions as the most significant weapon to guard against it, with an independent branch of the government, the judiciary, to wield that weapon. So long as it properly performs its functions in defense of those fundamental rights of "life, liberty, and the pursuit of happiness," legislative power cannot efficiently violate them.

The police power, with necessary limitations upon it, was contemplated by the framers of the constitution. Such limitations, and means of defining and of making them effective,

were amply provided for. How any one could have thought to the contrary, or considerately written for the guidance of others, or as grounds for judicial action anything inconsistent therewith, after *Marbury v. Madison,* 1 Cranch, 137, is not perceived. The police power may be extended disastrously, or restrained and administered beneficially, according as the judiciary shall fully perform its constitutional function. Confined within its legitimate field as to subjects, and to its function of mere regulation, it is essential for the full accomplishment of the purposes of civil government. It is commonly said that it extends to and permits legislation "regulating" reasonably "all matters appertaining to the life, limbs, health, comfort, good morals, peace and safety of society;" in short, to all which promotes the public welfare. *Baker v. State,* 54 Wis. 368, 372, 12 N. W. 12; *State ex rel. Larkin v. Ryan,* 70 Wis. 676, 681, 36 N. W. 823; *State v. Heinemann,* 80 Wis. 253, 49 N. W. 818; *Bittenhaus v. Johnston,* 92 Wis. 588, 66 N. W. 805; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561.

The significant word "reasonable," as above used, is not often found in defining police power. It should never be omitted in defining the constitutional scope thereof. The legislature has no unlimited authority in this field. Its scope has a complete encirclement of constitutional limitations, with the judiciary to stand guard at the boundary. The idea that it is "a sovereign power in the state, to be exercised by the legislature, which is outside, and in a sense above, the constitution" (*Donnelly v. Decker,* 58 Wis. 461, 17 N. W. 389), or that a police regulation which is clearly a violation of express constitutional inhibition is legitimate, subject to a judicial test as to reasonableness, in other words that there is such a thing as a legitimate, reasonable violation of an express constitutional prohibition (*People v. Jackson & Mich. P. R. Co.* 9 Mich. 285; Tiedeman, State and Federal Control, § 3), or that no police regulation, not condemned by some express con-

stitutional prohibition, is illegitimate, or that legislation not so condemned is legitimate if the law-making power so wills, though it plainly violates some fundamental principles of justice, or that the reasonableness of a police regulation, and whether it unjustly deprives the citizen of natural rights, is wholly of legislative concern (*Hedderich v. State,* 101 Ind. 564, 1 N. E. 47), and others of a similar character now and then found in legal opinions and text-books, are highly misleading. They are attributable to failure to appreciate the far-reaching purpose of the general constitutional declarations, the necessity contemplated by the constitution makers of a broad rather than strict construction of those general terms necessarily adopted in drafting such a charter, and the feature making the court the supreme judge as to the extent of limitations. If it were true that all police regulations are legitimate which are reasonable, and all are reasonable which the legislature so wills, the constitution as to very much of the field of civil government would be of no use whatever.

The idea that the general declared purposes of the constitution were incorporated therein as mere embellishments; that they are only meaningless "glittering generalities," "high-sounding phrases," "signifying nothing" in particular, was condemned, it seems, sufficiently for all time in *Marbury v. Madison, supra.* This court has spoken decisively in respect thereto. In *State ex rel. Jones v. Froehlich,* 115 Wis. 32, 42, 91 N. W. 115, 118, it was said:

"The police power has been wittily defined as the power to pass unconstitutional laws, and some utterances of courts have seemed to justify such conception. It is nevertheless erroneous. An act which the constitution clearly prohibits is beyond the power of the legislature, however proper it might be as a police regulation but for such prohibition."

Repeatedly it has been said here, that the declared purposes of the constitution are among the most valuable restraints upon legislative authority, and should be given all the force

which they were intended to have. *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 435, 87 N. W. 561.

So legislation referring to police authority for legitimacy, like any other exercise of the law-making power, must bear the test of constitutional limitations, which will be found upon all sides. On the one side it may meet the barrier of an express prohibition; on another the implied prohibition of any law not in harmony with the all-prevailing purposes of the constitution; on another the implied inhibition involved in the declaration that "the blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles" (sec. 22, art. I, Const.), and at last the limitation of reasonableness springing from the whole constitutional scheme. At that point, as before indicated, the judiciary holds the scales. The legislature is the sole judge of what is expedient, but the judiciary is the judge as to what is beyond the boundaries of reasonable regulation and in the domain of destruction, reasonable doubts in all cases being sufficient to sustain the former. Here is found the last, and intended to be impregnable, line of defense against abuse of police power. It has been well said that without it constitutional guaranties would be of no value. *Marbury v. Madison,* 1 Cranch, 137; *State v. Namias,* 49 La. Ann. 618, 21 South. 852; *State v. Vandersluis,* 42 Minn. 129, 43 N. W. 789; 22 Am. & Eng. Ency. of Law (2d ed.) 936.

Now with full appreciation, it is thought, of the way the law squares itself with reference to the foregoing, it seems that the court would not be justified in holding the same to be utterly unreasonable, or that without reasonable doubt its ostensible purpose to promote the public welfare is a mere cloak to shield a real purpose to promote the interests of members of a voluntary association of professional gentlemen. That the proper training of candidates for the dental profession, the

exclusion therefrom of incompetents, and the protection of the public against incapables being allowed to occupy an attitude rendering them liable by false pretenses to gain an opportunity to do injury, appertains to the public good in a most significant degree, is universally held. Such a law, to be sure, might be administered so as to work mischief. The mainspring of its enactment might be one thing and the ostensible purpose another. It is true, however, that similar laws are in force and have passed the test of constitutionality in at least thirty-eight states of the Union.

The feature of the law permitting the voluntary association to dictate in a controlling degree the make-up of the board,—the one particularly pointed out by counsel as fatal,—has been sustained by this and other courts on many occasions. A similar feature is found in most all of a multitude of similar laws upon the various statute books of this country. This court, in *State v. Heinemann,* 80 Wis. 253, 49 N. W. 818, approved a law restricting all appointments to the board to nominees of the voluntary association. The following are other significant instances of approvals of such laws: *Wilkins v. State,* 113 Ind. 514, 16 N. E. 192; *Overshiner v. State,* 156 Ind. 187, 59 N. E. 468; *Ex parte Frazer,* 54 Cal. 94; *Ex parte Gerino,* 143 Cal. 412, 77 Pac. 166; *Ferner v. State,* 151 Ind. 247, 51 N. E. 360. The legislative idea is, doubtless, this: It is of great importance to the dental profession that competent candidates therefor only shall be admitted thereto. Such interest is, at least, second only to that of the public. Distinguished members of the profession are of all men the best equipped to conserve the common good. The profession at large may reasonably be trusted to point out such members. Ordinarily none but such would be permitted to stand for the whole. Therefore the surest means of obtaining men of that class to execute the law is to look to the profession at large for nominations. That, certainly, is not unreasonable.

Fourth. "The law is void, because it denies the right to

study dentistry to persons not possessing qualifications there mentioned, which requirements cannot be upheld under the police power."

We are unable to see that the law has the effect suggested. For aught that appears therein one can study dentistry regardless of his qualifications to compete for a diploma entitling him to a license without examination. He may even be graduated regardless of his accomplishments. He can, however, not have a license to practice except upon condition of showing requisite qualifications. In case of his *alma mater* being reputable and having all other statutory requisites such qualifications are provable by his certificate of graduation; otherwise they must be shown by examination. No one under the law is required to attend a dental college at all, in order to enter the profession. He may acquire the essential qualifications by serving under any dentist conducting a reputable practice. Ch. 411, Laws of 1893, at sec. 4.

The following citations, in addition to those heretofore given, cover favorably to the appellants all questions raised as to the constitutionality of the law: *Hewitt v. Charier,* 16 Pick. 353; *Ex parte Spinney,* 10 Nev. 323; *State v. Call,* 121 N. C. 643, 28 S. E. 517; *People v. Phippin,* 70 Mich. 6, 37 N. W. 888; *State v. Creditor,* 44 Kan. 565, 24 Pac. 346; *State v. Randolph,* 23 Oreg. 74, 31 Pac. 201; *State v. Knowles,* 90 Md. 646, 45 Atl. 877; *State v. Bair,* 112 Iowa, 466, 84 N. W. 532; *State v. Heath,* 125 Iowa, 585, 101 N. W. 429; *Gosnell v. State,* 52 Ark. 228, 12 S. W. 392; *State ex rel. Granville v. Gregory,* 83 Mo. 123; *Harding v. People,* 10 Colo. 387, 15 Pac. 727; *Williams v. People,* 121 Ill. 84, 11 N. E. 881; *People v. Blue Mountain Joe,* 129 Ill. 370, 21 N. E. 923; *Driscoll v. Comm.* 93 Ky. 393, 20 S. W. 431; *State ex rel. Kellogg v. District Court,* 13 Mont. 370, 34 Pac. 298; *Craig v. Board of Med. Exam.* 12 Mont. 203, 29 Pac. 532; *C. Gee Wo v. State,* 36 Neb. 241, 54 N. W. 513; *Barmore v. State Board,* 21 Oreg. 301, 28 Pac. 8; *People v.*

Moorman, 86 Mich. 433, 49 N. W. 263; *State v. Forcier*, 65 N. H. 42, 17 Atl. 577; *People ex rel. Nechamcus v. Warden*, 144 N. Y. 529, 39 N. E. 686; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564; *State v. Gazlay*, 5 Ohio, 14; *Goldthwaite v. Montgomery*, 50 Ala. 486.

We now turn to the official record kept by the board as returned in response to the writ. In any view of the case, upon that and that alone appellants must rely to sustain its jurisdiction upon the merits. Here we must take note of the difference between jurisdictional error as to a court proceeding according to the course of the common law and such error as to a mere tribunal exercising *quasi*-judicial authority. In the former, jurisdiction of the party and subject matter being established, the determination cannot be successfully challenged for such error though the basic questions of fact rest upon insufficient evidence, or have no foundation whatever therein. The judgment in such circumstances may be erroneous but not reversible upon writ of *certiorari* for jurisdictional defect. In the latter, a clear violation of law in reaching a result within the power of the tribunal to reach proceeding properly, is jurisdictional error. In the former, the evidence is not reviewable at all. In the latter, it may be reviewed, but only to the extent of determining whether there is evidence upon which the tribunal could reasonably and honestly have reached the conclusion which it did. The evidence cannot be weighed for the purpose of determining whether the same clearly preponderates against the decision. It may be looked into only to see whether there was competent evidence sufficient, in reason, to incline the mind efficiently to the conclusion reached. In the first a conclusion without any credible evidence to support it, or any evidence at all, is mere judicial error. In the second, want of credible evidence which, in case of the verdict of a jury, would be sufficient upon appeal to require a reversal is jurisdictional error: error committed outside of jurisdiction instead of in the exercise of jurisdiction, where the writ takes

hold, performing its function of returning the tribunal to its proper sphere of action. *State ex rel. Durner v. Huegin,* 110 Wis. 189, 237, 85 N. W. 1046; *State ex rel. Heller v. Lawler,* 103 Wis. 460, 79 N. W. 777; *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188.

In examining the evidence we may well start with the decision of the board June 15, 1903, establishing the reputability of the college. In all reason that should have put all questions respecting the matter at rest, subject only to something coming to the attention of the board fairly calling for a new investigation. It would be intolerable for a college after having its status deliberately established, especially in a direct proceeding, to be compelled from time to time thereafter, regardless of any change of conditions, to submit to a new investigation, or for its patrons to be so compelled. That was definitely proclaimed in *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 88 N. W. 587. However, since the action referred to was accompanied by a censure for violating rule 23 prohibiting the admission of students for less than the advertised fees, it will be assumed that the proceedings in the whole were in the nature of such a condonation of past offenses that subsequent transgressions, if there were any, furnished some justification for considering the same and the past and forgiven offenses as well.

Commencing at the beginning and tracing the history down to the issuance of the writ, in brief, we find these circumstances relied upon by appellants:

(1) June 8, 1903, the board in effect held the college for suspension as to reputability unless the negative appeared satisfactorily as to the following: Is it guilty—

(a) Of having violated rule 23 prohibiting the acceptance or retention of students at less than the advertised fees?

(b) Of having matriculated students without the certificates of the official examiner as to sufficiency of entrance qualifications?

(c) Of having unjustly and intentionally aspersed the character of the official examiner as to fitness and honesty as a public servant?

(d) Of having unreasonably failed to confront the official examiner before the board as to charges made against him?

(2) The college permitted six students who failed in the entrance qualifications for the session of 1902–1903 to be matriculated, nevertheless, and continue in attendance making up their deficiencies during the year, contrary to the board's rule on the subject.

(3) The college catalogued the six students for the session of 1903–1904 as "juniors," counting the year partly spent in preparatory studies as satisfying the first year of the course, contrary to the board's command in respect to the matter.

(4) The college elected to submit to the decision of the court,—unless ordered to the contrary by the board,—requiring it to give the six students full credit for the year partly spent in the work of preparation, contingent upon whether such action would be regarded by the board as rendering it not reputable.

Aside from the foregoing the college was regarded as reputable, the judgment of the board in that regard having been certified September 15, 1902. It and its graduates were in all reason entitled to rely thereon till the occurrence of something inconsistent therewith. Once established, the status of reputability would be presumed to continue until reasonably rebutted. Time would have no effect thereon except to weaken the presumption, if even that.

The determination of June 15, 1903, settled in favor of the college the alleged misconduct in respect to matters mentioned in No. 1 other than that respecting violation of rule 23. There were then in the institution six students who matriculated for 1902–1903, though failing in some respects in entrance qualifications, and spent the full year in study, partly, however, in making up deficiencies.

At the time of the adjudication the board had on its files a communication from the college requesting the status of the six students as to competency for the second year's study of a three years' course to be determined, and that they might be accorded an examination as to entrance qualifications prior to the commencement of such year, and, if found satisfactory, that they might have credit for having taken one full year's study of such three years' course. The grounds for the request were these: Up to the commencement of the session of 1902–1903 the board permitted entrance qualifications to some extent to be made up during the first year of the course. Negotiations with students leading up to their admission were conducted upon that basis without knowledge, until shortly before the commencement of the session, that the custom in that regard had been abrogated. The students who failed had, under the circumstances, some moral claim on the college which it endeavored to discharge by making them special in the freshman year and entering them in the academic department as well, and requiring them to spend three hours in study each day in respect to the subjects wherein they were deficient. The request was not responded to. The institution on a previous occasion,—January 29, 1903,—earnestly requested the board to define the status of the six students, which was replied to, in effect, that the matter would be considered upon the board being put in motion "in the usual way to act upon the character and management of your school." The only reference to this matter found in the board's disposition of the subjects investigated as aforesaid is contained in a companion resolution to the one of censure. The two may well be restated at this point.

"*Resolved,* That the Wisconsin State Board of Dental Examiners, after careful investigation, find that the *Milwaukee Medical College,* Dental Department, has violated sec. 23 of the rules and regulations of said board, relating to the admission of students for less than the advertised fees. It is the sense of the majority of this board that the offense is not

of sufficient gravity to warrant the withholding of licenses on diplomas issued to the class of 1903, and therefore the secretary is hereby instructed to issue licenses on application to members of said class according to law.

"*And further resolved,* That the *Milwaukee Medical College,* Dental Department, is hereby censured for its conduct in this matter, and we therefore give the college fair warning that any further violation of the rules of this board will not be tolerated and all rules of the board will be strictly enforced."

That left the college in some doubt as to how the infraction of rule 23 was disposed of. The past was at least excused, but how about the future? The specific request that the students might have credit for one full year of a three years' course was not responded to. Both the college and the students were left in suspense in regard thereto except as they might imagine the attitude of the board from the second resolution. The college was held reputable, notwithstanding its sin in respect to the matter, but it was not determined clearly that it would be consistent with reputability for it to graduate the six students after two more years of study. The resolution was suggestive to the contrary. The students, however, were catalogued for the session of 1903–1904 as "juniors." The board having changed the reputable standard for graduation from a three years' to a four years' course, the new order of things to commence with the session of 1903–1904, it will be seen that if the matriculation of the six students for the previous session was to be deemed regular they were in the former class, otherwise in the latter.

Soon after the commencement of the session of 1903–1904 the board, through its president, successfully sought advice from the National Association of Dental Faculties as to whether the six students should be regarded as having taken one year of a three years' course contingent upon their showing proper entrance qualifications to commence the study of dentistry, or in such contingency to be regarded as having

taken one full year of a four years' course. A controversy, however, soon arose as to the nature of such advice. Appellants insisted that it was to the effect that the students should show proper entrance qualifications and take three years more of successful study, while Dr. Gray, one of the active members of such association, who participated in the matter, insisted that only two years more of study should be required, the young men to be regarded, upon showing proper entrance qualifications, to have taken one year of a three years' course. The controversy was settled in favor of the former theory, Dr. Gray however insisting, "My opinion is that the young men should be permitted to go on and graduate in two more years. I think it is outrageous upon these boys that they are not permitted to do this. However, if it is against the law I will submit."

About the time of the initiation of the transaction last related, the official examiner reported four of the six students to have presented to him teachers' second grade certificates apparently showing proper entrance qualifications. January 23d thereafter,—by a resolution, in general terms, but which was given peculiar significance as to the conduct of respondent respecting its having catalogued the six students as three-year students, by its being sent by special direction thereto,—colleges were admonished that no such institution would be recognized as reputable in which students were allowed to continue in attendance upon any conditions other than those required of regular matriculants whose credentials were duly approved, and who had in all respects complied with the requirements of the published rules and regulations of the board regarding the conduct and reputability of colleges desiring recognition of their diplomas.

Notwithstanding such admonition, respondent permitted the students to continue through the junior course, and catalogued them for the session of 1904–1905 as "seniors," thus indicating defiance of the board's ruling that they should be

permitted to graduate, if at all, only in the class of 1906. As the time approached for the coming out of the class of 1905, the attitude of the board was that of threatening respondent with condemnation if it permitted the six students to graduate as members of that class, and the attitude of respondent was that of endeavoring to avoid giving cause, voluntarily, therefor. In that situation one of the students commenced a *mandamus* action to compel the respondent to recognize him as possessing the requisite standing for graduation with the class of 1905, setting forth most of the facts herein detailed appertaining thereto. Respondent submitted, without objection, to the matter being thus brought before the court for adjudication, giving appellant full opportunity to maintain, in the former's name, its own position in respect to the matter. The tender was declined. Respondent, in its own behalf, made return to the first writ, setting forth all facts in regard to the controversy not already appearing in the proceedings. Such action was thereafter had in respect to the matter that a decision was rendered in favor of the student June 22, 1905, a peremptory writ being ordered.

The result of the *mandamus* action was in due time brought to the attention of the board. Thereupon it held a meeting and adopted, seemingly without time for consideration or effort in that regard, a resolution condemning respondent as not reputable, but subsequently the same was reconsidered and further action in respect thereto was postponed, as the record states, "to obtain further information on the subject."

The subject referred to in the foregoing was that of whether respondent purposed submitting to the decision of the court without further contesting the matter. That is evidenced by the fact that on the day after the proceedings the board caused inquiry to be made of respondent as to whether it "had taken or contemplated taking any steps to graduate the six students." Reply was made thereto the next day, to the effect that no such steps had been taken or were contemplated and that respond-

ent would not issue to the students diplomas except under compulsion, that the action to test the matter had been defended in good faith, and that in any event appellants should have the fullest opportunity in respondent's name to further defend. Response was made thereto on the same day demanding to know what steps respondent intended to take, if any, to avoid the court's decision. To that answer was made the following day that respondent would be obliged to defer to the court's order "unless you now order us in writing not to issue such diploma, or else give us a notice in writing that in the event of our issuing such diploma you will declare our college not reputable. In that case we shall not issue the diploma. We are much perplexed, and would like an answer today." That seemingly humble submission did not secure an answer in advance of the act complained of. The next day the board reconvened. The correspondence mentioned, together with information of the issuance of the peremptory writ, was before it. The resolution theretofore laid over, "to gain further information on the subject," was, as it appears, promptly taken up and the final act sought to be reviewed occurred by unanimous vote. The modest request of respondent as aforesaid was thus answered without previous notice that such a calamity to it was impending. On the contrary, it had every reason to believe its attitude of submission contingent on receiving positive information of appellants' requirements, would at least prevent any hasty action, and probably any action whatever, in advance of due notice to it and opportunity to be heard.

So, in brief, the transgressions of respondent for which the sentence of nonreputability was pronounced were three in number, namely: (1) Violation of rule 23 prohibiting concessions to students from advertised fees; (2) violation of the rule prohibiting colleges from accepting students with permission to make up deficiencies in entrance qualifications the first year of their course; (3) violation of the board's order that the

six students should be denied credit for the year partly spent in making up entrance qualifications. Did such transgressions furnish any reasonable basis for the condemnation complained of?

The question suggested must be tested having regard to the meaning of the word "reputable" as used in the law under consideration, and whether in view thereof the standard set by the board can be regarded as reasonable. As said in *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 88 N. W. 187, the board in respect to such matters has a wide discretion. It would require a strong case against it to warrant condemnation for abuse of authority, yet there is a limitation beyond which it cannot go. That limit is the boundary between that which is substantial and therefore reasonable, and that which is purely arbitrary or trifling and therefore unreasonable. The board's action cannot properly be condemned because some or even most persons cannot discover any reasonable ground therefor. To warrant that it must be so violative of reason as to evince a total absence of that fair judgment which should distinguish action of a judicial nature: in short, as to seem baseless when tested by reason and common sense.

The meaning of the word "reputable," as used by the legislature in the instance in question, has not been judicially defined with that exactness which it seems the importance thereof demands. In *State ex rel. Coffey v. Chittenden,* the definition found in an early edition of Webster's Unabridged Dictionary was quoted and given first place, namely, "worthy of repute or distinction; held in esteem; honorable; praiseworthy." Second place was given to the phrasing found in the Century Dictionary, namely, "being in good repute; held in esteem; consistent with good taste." The Illinois court, in *State Board v. People ex rel. Cooper,* 123 Ill. 227, 13 N. E. 201, adopted the first definition. It will readily be observed that in some respects it is erroneous, while in the whole it has a double meaning. It is erroneous in that it fails to suggest

whether it is requisite that the repute or distinction must be good or bad; there is a double meaning in that the first part of the definition, when corrected, would signify a condition of being entitled to a good reputation; while the second part suggests the existence of good repute or reputation in fact. The one relates to actual character; the other to supposed character according to common understanding. As it has been said, one relates to the internal and the other to the external, the former being the substance and the latter the shadow. *In re Spenser,* 7 Cent. Law J. 84, 85.

In our discussion in the former case it was said that "the law does not attempt to define reputability but uses the term in its ordinary sense." It is used "to convey its common meaning, the meaning generally ascribed thereto in everyday ordinary expression calling for its use." What that common, ordinary meaning is as between worthy of good repute and good repute in fact, was not said expressly, but the grounds considered and upon which the board acted, and which were challenged for insufficiency, appertained to true worth, not reputation therefor. Therefore, it is now considered by the court, that it was then held, the legislature used the term reputable, as indicative of worthy of good repute; and that since the legislature shortly after that decision was made, and presumably with regard thereto, amended the law into the form in which we now find it, and which guided the board at the time of the transactions in question, it is too late to reconsider the matter. For the court it is desired to make this as emphatic as may be, and to that end reference is again made to the fact that the primary signification of the words "worthy of repute or distinction" as found in the early edition of Webster, regarded as meaning worthy of good repute or distinction, was in the former case given first place, and that the discussion in detail of the facts proceeded to a conclusion in the light thereof. However, for myself, I reserve the privilege of dissenting on this point.

Now what is there so very wrong about conceding to students some deduction from advertised fees, as seems to have been done, by the respondent, that it should be regarded as suggesting nonreputability. No light is shed on that question by counsel for appellants. If there is any reasonable basis for the board's rule 23, or its rule 36, fixing the minimum charge to students at $100 per term, which seems to be inseparable from the former rule, we are unable to discover it. Reputability has reference to those things which go to the proper preparation of candidates for the dental profession. We venture to say that, all other things being equal, the institution that takes worthy young men, making concessions in their favor to meet their financial needs, thereby assisting them to attain the object of their ambition, is no less worthy of good repute than one which holds to an arbitrary schedule in that regard, tending to exclude much of the very best material for the profession therefrom. Without any extended discussion, it is considered that rule 23, and other rules upon which it is based, are highly unreasonable.

The system of legislative control under consideration was not designed to enable a licensing board to interfere with the mere business management of dental colleges by making laws regarding their charges for instruction, and their treatment of students in respect to their schedule of fees. The power conferred was limited to reasonable protection of the public against danger of incompetent practitioners securing patronage, and is wholly of an administrative character. If the legislature were to go further than to conserve the public welfare, its action in that regard would be destructive, not regulative, of rights and so would be outside of constitutional authority. What interest is it to the people whether a dental college maintains its fees up to a published standard or not, or what particular sum it demands of students as a consideration for the advantages it affords to them. None whatever, as

it seems. The board went entirely outside of its legitimate sphere of action in respect to those matters.

The second ground of the board's action has as little to justify it as the first. We search the law in vain for anything in its letter or spirit justifying the board in taking charge of the subject of passing upon entrance qualifications through its representatives, and making submission to such interference with the business of the college a condition of reputability. There seems to be as little support for the board's third ground of action; its prohibition to the making up, to any extent, of entrance qualifications during the first year of a student's course, and making submission to that regulation a condition of reputability. As well might the board assume authority to regulate any one of many mere administrative features of dental colleges, such as the ordinary examinations during the course, or the particular persons to be employed as instructors, or the test to be applied as to their capability, or the particular person to apply such test, or the compensation to be paid to members of the instructional force.

The law requires, not as a condition of reputability of a college, but as a condition of the board's issuing to its graduates licenses upon the faith of their diplomas alone, preliminary education, as to matriculants, equivalent to that for entrance to the junior class of an accredited high school. By necessary implication, the language of the law leaves the college unhampered as regards the examination in respect to that requirement. By necessary implication as well, it clothes the board with ample authority to determine as occasion may require, whether such duty has been performed in good faith. The board in this matter, as well as in fixing minimum charges and prohibiting variations from advertised fees, invaded the functions of the legislature, if such power exists at all. In the particular case the interference was peculiarly oppressive in that it was not brought to the attention of the respondent

until too late for compliance therewith for the session of 1902–1903 without embarrassment to itself and great injustice to its patrons.

The arbitrary character of the board's action is further evinced by the fact that the standard of admission at the time it was created was wholly of the board's invention. The statute, prior to 1903, did not contain any regulation on the subject. In the amended act of that year a feature was added to the existing law in accordance with the rules which the board had theretofore prescribed for the government of colleges, no authority, however, being given to the board, expressly or by implication, to take charge of that branch of the colleges' business.

The statutory requirement as to entrance qualifications must be presumed to have been enacted with reference to the common practice of educational institutions as to allowing, in a reasonable degree, deficiencies in entrance qualifications to be made up during the early part of the school course, and contemplated a continuance of that custom. Any other construction of the law would render it such an oppressive and unreasonable interference with the ordinary business of schools as to require its rejection as absurd if not its condemnation as unconstitutional. The language requiring "a preliminary education equivalent to," etc., is not wholly inconsistent with liberty to allow such education, in some reasonable degree, to be made up within a reasonable time after commencement of the course. Some unmistakable prohibition would be required in order to indicate a legislative purpose to abrogate the custom in that regard which has prevailed generally throughout the country. Entrance qualifications are required for admission to the courses of study universally, in reputable institutions of learning. The regulations in that regard are as universally published for the benefit of all whom it may concern, and yet, commonly, they are regarded as satisfied, though the student falls somewhat below the required

standard as to some mattters not very essential, if he makes up the deficiency within a brief period after his matriculation.

The last ground of the board's action has been, perhaps, sufficiently condemned without further discussion. It was a very natural climax to the misconception of authority evinced by the adoption of the arbitrary rules before mentioned. Mere assumed authority, if not checked, will ultimately run wild, as it did somewhat in this case, in condemning respondent as not reputable because of its determination to obey the judgment of the circuit court without further contesting the matter, unless seasonably notified that such a course would lead to its being condemned as not reputable. Nothing said herein should be construed as casting any reflection whatever upon the motives of the gentlemen composing the board, or their advisers. They doubtless, in the best of good faith, acted throughout according to their honest judgment respecting the power vested in them by the law. The fact that they were seriously mistaken only emphasizes the common saying that men, however distinguished and conscientious, are nevertheless liable to make great mistakes.

The foregoing disapproval of the board's action is emphasized by the fact that the law regards reputability to be something separate and distinct from other requirements essential to the graduation certificate of a college constituting an efficient basis for a license to practice the profession of dentistry. It requires: (1) That the college shall be duly incorporated; (2) that the entrance qualifications shall be as indicated; (3) that the period of study shall include seven months in each of four years; (4) and that the college shall be reputable. It may have all of the specific requirements except the last, and be infirm in respect thereto. Again it may have the last essential and not the rest, since the former has reference to general equipment to accomplish in fact good work and send out graduates for the profession of dentistry fully trained therefor, so that the public may safely trust them. There

might be the equipment and such result, entitling the institution not only to be called reputable, but to special distinction, and it might actually achieve such distinction, and yet not have some of the other statutory essentials to the admission of its graduates into the profession without examination. The mere failure to comply with the statute, *a fortiori* with the regulations made by the board with respect to its internal affairs, would not justify sentencing the college, as in this case. Reputability has no reference whatever to mere submission to rules of the state official board or any other board. It has reference, as before indicated, to the actual facilities it possesses for good work as regards preparing candidates for the dental profession, and the actual use of such facilities so as to accomplish good work.

What has been said exhausts the subject of whether the board, assuming that it had jurisdiction of the subject matter of the reputability of respondent, incidental to the determination of the rights of waiting applicants for licenses, exceeded its authority by passing judgment without any reasonable basis therefor, answering the question in the affirmative.

Turning to the situation presented, assuming the character of the proceeding as being directly against the college to adjudicate its status, the sole party on the one side being the respondent, the result is the same, since, as we have seen, no notice was given to it with opportunity to be heard, no reason existed for neglect in that regard, and the proceeding to a finality in face of such neglect was not due process of law. So, in any way we can view the record, the board committed jurisdictional error fatal to its action, warranting the judgment appealed from. In one aspect the error was excess of jurisdiction; in the other, it was total want of jurisdiction.

By the Court.—The judgment is affirmed.

DODGE, J., dissents.

NORTH SIDE LOAN & BUILDING SOCIETY, Appellant, vs. NAKIELSKI, imp., Respondent.

February 23—March 20, 1906.

Pleading: Complaint: Prayer: Amendment: Construction: Cause of action, at law or in equity?

1. In an action on the bond of a defaulting treasurer of plaintiff the complaint alleged, in substance, that certain words making the bond applicable to the then present term of the treasurer had been omitted by mistake; that the treasurer had misappropriated the moneys of the plaintiff; that he failed to keep proper accounts and pay over to his successor a named balance, part of which he had loaned himself contrary to the regulations of the plaintiff society; and that of many of the details of the treasurer's transactions plaintiff was ignorant by reason of such treasurer's failure to keep or file any accounts, and concluded with a prayer for recovery from all the defendants (principal and sureties) of the named sum. On motion the court ordered that the complaint be made more definite and certain, whereupon an amended complaint was served setting up all that was in the original one, an allegation of the misappropriation of another definite sum, and more fully and definitely asserting the inability of plaintiff to state any further details by reason of knowledge with reference thereto being in the treasurer and having been wrongfully withheld from the officers of the society, and prayed (1) a reformation of the bond; (2) discovery and accounting by the treasurer for his transactions and arrearages; (3) judgment for the amounts so ascertained in a definite sum. *Held:*

   (1) Apart from the prayer the original complaint stated a cause of action in equity.

   (2) The amendment went no further than to somewhat amplify the facts stated in the original complaint, and to pray certain steps by the court within its equity powers necessary to enable granting the same relief prayed in the former pleading.
2. The prayer of a pleading is no part of the cause of action, and while in construing a pleading, where the facts alleged leave doubt as to the cause of action which the pleader intended to present, the prayer may be often helpful in elucidating that intent, if a cause of action is clearly set out it cannot refute it.
3. In view of the limitation imposed by sec. 2830, Stats. 1898 (that amendment of complaints shall not substantially change the

claim), the right of the plaintiff to amend before the time for answering has expired is subject to the limitation that the inherent difference between tort and contract and between law and equity cannot be ignored.

4. Where a complaint sets forth all the facts warranting equitable relief, the prayer may, before the time for answering has expired, be amended to demand other and further relief consistent with the cause of action originally described in the allegation of facts.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

The complaint of the plaintiff alleged the election of defendant Schramka as its treasurer in March, 1903, and the subsequent giving of a bond with the other two defendants as sureties, conditioned, among other things, that said Schramka "shall, at all times, in and during any succeeding term for which he may hereafter be elected as such treasurer" perform his various duties as treasurer, including the keeping of books, accounts, and vouchers, and the accounting for all moneys, books, notes, mortgages, and other instruments in favor of the society during his continuance in said office, and the proper disbursements and accounting for all moneys that should come to his hands, and the delivery and payment to his successor of all property and moneys; that, by mistake of the scrivener and contrary to the intention of all parties, there was omitted in the above quotation, after the word "during," the words "the term for which he was elected and," and that the intention of all parties was to execute a bond having such omitted words in it. The complaint further generally alleged that the defendant Schramka had breached his duties, misappropriated moneys, and failed to keep or make any account or record of transactions, and that he had paid out large amounts of money contrary to regulations and without proper authority; that he had failed to report or pay over to the society moneys collected by him for it; that he had received upwards of $100,000 and had failed to account therefor, and had

failed to pay or account to his successor for the balance of $14,822 remaining in his hands, and that of said sum he had pretended to loan $4,000 to himself, contrary to the regulations of the society, upon a pretended second mortgage; that as to many of the details of said money transactions the plaintiff was ignorant by reason of said Schramka failing to keep or file any accounts. The complaint concluded with a prayer for the recovery from all of the defendants of said sum of $14,822. On motion of defendant *Nakielski* the court ordered that the complaint be made more specific in certain definite respects. Within the time limited for answering the complaint, and after said order, the plaintiff filed an amended complaint setting up all that was in the original one, besides another alleged misappropriation of the sum of $2,000, and more fully and definitely asserting the inability of the plaintiff to state any further details by reason of knowledge with reference thereto being in the defendant Schramka and having been wrongfully withheld from the officers of the society, and prayed (1) a reformation of the bond by inserting the words making it applicable to the term for which Schramka was elected; (2) for discovery and accounting by Schramka of his transactions and arrearages; and (3) for judgment for the amounts so ascertained in the sum of $14,822. This amended complaint was returned by defendants, upon the stated reason that it attempted to change the cause of action from law to equity and that it did not contain facts sufficient to constitute a cause of action, and they moved that said amended complaint be stricken out and that the original complaint be dismissed for failure to comply with the order to make more specific. Whereupon the court ordered said amended complaint to be stricken out with leave to plead over within ten days. Thereupon the plaintiff gave formal notice of its intention to stand upon the amended complaint and its refusal to serve another. Whereupon judgment was ordered and entered dismissing the plaintiff's complaint, and adjudging that the plaintiff take

nothing thereby as to the defendant *Nakielski,* in whose favor costs were adjudged. From this judgment plaintiff appeals.

For the appellant there was a brief by *James C. Officer* and *Timlin & Glicksman,* and oral argument by *W. H. Timlin.*

For the respondent there was a brief by *Hoyt, Doe, Umbreit & Olwell,* attorneys, and *Frank M. Hoyt,* of counsel, and a separate brief signed by *Moritz Wittig,* attorney, for defendant *Mayer,* and oral argument by *Mr. Hoyt.*

DODGE, J. We find ourselves unable to agree with the trial court that the amended complaint should have been stricken out. That document went no further than to somewhat amplify the facts stated in the original complaint, and to pray certain steps by the court within its equity powers necessary to enable granting the same relief prayed in the former pleading. Apart from the prayer the original complaint clearly and unambiguously states a situation arousing the power and duty of a court of equity to apply its peculiar methods in order to accomplish justice between the parties; and it contains industrious statement of facts having no relevancy whatever to any mere action at law which could be based upon the written instrument set forth. In *Jos. Dessert L. Co. v. Wadleigh,* 103 Wis. 318, 320, 79 N. W. 237, it was said:

"When a complaint is presented for judicial inspection, it is the court's first duty to ascertain the nature of the cause of action alleged, as well to protect the rights of parties as to the place of trial, as to administer the proper remedy." Approved in *Klipstein v. Raschein,* 117 Wis. 248, 94 N. W. 63; *Grunert v. Brown,* 119 Wis. 126, 129, 95 N. W. 959.

In the *Klipstein Case* an allegation that defendant knowingly made certain false warranties was held sufficient to show conclusively that plaintiff intended an action in tort and not on contract, although all the facts to support recovery on contract were present. Such reason would in the present case enforce the conclusion that the plaintiff intended to state a cause

of action in equity, for to no other end could he have alleged mistake in writing the bond, or knowledge by defendant of the amounts and acts essential to a recovery, and plaintiff's ignorance thereof. *Somervaill v. McDermott,* 116 Wis. 504, 93 N. W. 553. But it is urged the prayer is for purely legal relief, namely, merely a judgment for a sum of money. Such relief is, however, equally within the power of a court of equity, though ordinarily to be had in that jurisdiction only when other of its powers are sought to be invoked also. The most, therefore, that can be said of the prayer is that it did not demand all the activities of the court to which the cause of action stated by plaintiff entitled him. In construing a pleading where the facts alleged leave doubt as to the cause of action which the pleader intended to present, the prayer may often be helpful in elucidating that intent. *Gillett v. Treganza,* 13 Wis. 472; *Topping v. Parish,* 96 Wis. 378, 381, 71 N. W. 367. But, after all, the prayer is no part of the cause of action (Pomeroy, Cod. Rem. [4th ed.] § 471), and, if that is clearly set out, cannot refute it. We recently declared:

"In treating a complaint to determine whether it is single or double as regards primary rights, the different objects in view by the pleader as indicated by the prayer for relief are not controlling. They are of no significance whatever, except to aid in clearing up obscurities that may exist as to whether he intended to state facts showing a violation of distinct primary rights or not. When there is no obscurity in that regard, the statement of facts upon which the prayer for relief is based alone speaks." *South Bend C. P. Co. v. George C. Cribb Co.* 105 Wis. 443, 447, 81 N. W. 675. See, also, *Fischer v. Laack,* 76 Wis. 313, 321, 45 N. W. 104.

It is, of course, settled law in this state that those inherent differences between tort and contract and between law and equity cannot be ignored by courts in allowing amendments of complaints, in view of the limitation imposed by sec. 2830, Stats. 1898, that such amendments shall not substantially

change the claim. *Jos. Dessert L. Co. v. Wadleigh, supra; Post v. Campbell,* 110 Wis. 378, 85 N. W. 1032; *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55. It has also been held that the right of a plaintiff to amend before defendant has been put to his defense under sec. 2685, Stats. 1898, has some limitation, although the statute imposes none. *Carmichael v. Argard,* 52 Wis. 607, 9 N. W. 470. It is, however, no infringement of the rule of these cases to hold that, to a complaint which sets forth all the facts warranting equitable relief, the prayer may be amended to demand other and further relief consistent with the cause of action originally described in the allegation of facts within the period limited by sec. 2685, Stats. 1898, and by authority of that section.

Concluding, as we must, therefore, that the service of the amended complaint was within the plaintiff's right, of course the order striking out the same, as also judgment dismissing the action, were both erroneous. That complaint fully excused any lack of particularity by reason of plaintiff's ignorance of details resulting from defendant's breach of duty to inform it of his official acts, and presented a situation calling for the exercise of the court's equitable power to impose the duty of accounting in the first instance upon such defendant. *Somervaill v. McDermott, supra.*

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

WADE, Appellant, vs. HERNDL, Respondent.

February 23—March 20, 1906.

Landlord and tenant: Constructive eviction: Rents: Instructions to jury: Measure of damages: Evidence.

1. Where a tenant asserts eviction from the rented premises, actual expulsion is not necessary, but any act of the landlord or of any one who acts under authority or legal right given him by the

landlord, which so disturbs the tenant's enjoyment of the premises as to render them unfit for occupancy for the purposes for which they are leased, is an eviction, and, whenever eviction takes place, the tenant is released from the obligation under the lease to pay rent accruing thereafter.

2. In an action for rent it appeared, among other things, that plaintiff leased to defendant a room for an art studio, and afterwards leased the room underneath to an automobile company, that the shaking and vibration of the building and her room, caused by the operation of automobiles in the building and under her apartment, prevented her from conducting her vocation and business, and that therefore she was compelled to leave the premises before her lease expired. *Held*, that the defendant was evicted from the rented premises.

3. In such case it further appeared that the shaking and vibration complained of was caused by the testing of the automobiles, which testing was incident to the regular conduct of the automobile company's business and not confined to engines undergoing repairs; that the tenant's room was located over that part of the display room where this testing was done, and that the testing was not unnecessary or unusual. *Held*, that such shaking and vibration was necessarily within the contemplation of the parties when the lease to the automobile company was made.

4. In such case it further appeared that upon the complaint of the tenant the landlord investigated the matters, and, after observing from the tenant's room the effect of the testing of the automobiles, took no steps to prohibit the automobile company from continuing to make the tests. *Held*, that the court did not err in ruling that the acts of those in charge of the automobile business were within the rights granted them by the landlord under their lease, and that it was not error to instruct the jury: "Under the evidence in this case the presumption stands uncontradicted that the automobile company, under their lease, had a right to test their machines, and to do what they did."

5. On an issue as to the damages for breaking a picture belonging to an artist, the measure of damages is the pecuniary loss suffered by the breakage—the diminution in the market value of the article injured,—and hence it is not error to strike out testimony as to the value of the broken picture, as a design, apart from its market value.

6. Where a landlord permits a tenant in his building to conduct business so as to result in the eviction of another tenant, expenses incurred by the tenant in removing from the building, and loss of time in his employment on account of such removal,

are *held* proper elements of recovery resulting from the breach of the landlord's obligation.

7. When a lease exempts the landlord from liability for damage occasioned by the "acts or neglect of cotenants or other occupants," such exemption does not apply to the acts or neglect of cotenants or occupants authorized or committed under any right given by the landlord.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

By a lease executed and delivered on October 14, 1901, plaintiff leased defendant, from that time until May 1, 1903, "in the city of Milwaukee, . . . one large front room, . . . to be occupied for an art studio and for no other purpose whatever," at a rental of $18 per month. Defendant paid the rent up to and including the month of December, 1902. Plaintiff sets up two causes of action, the first being for the unpaid rent for the months of 1903 which is due under the lease, and for a second cause of action plaintiff sets up a contract with defendant for the heating of the room leased from October 1, 1902, to May 1, 1903, for $35. August 1, 1902, the first floor of the building, under defendant's studio, was occupied by an automobile company under a lease from plaintiff. Defendant alleges that she refuses to pay the rent as provided by the lease on account of the shaking and vibration of the building and her room, caused by the operation of automobiles in the building and under her apartment. She claims that she was thereby prevented from conducting her vocation and business as an artist, and through the fault of the plaintiff in leasing to and permitting the automobile company to use part of the building as an automobile livery she was compelled to leave the premises before her lease expired. The heating plant by which plaintiff proposed to supply defendant with heat and which forms the basis for the second ground of action was not completed until November 1, 1902. Defendant claimed that it was insufficient, and she continued to heat her room by a stove. No error is claimed as to this claim on this

appeal. Defendant alleges that as a result of her eviction, through plaintiff's fault in rendering the room unsuitable for the purposes for which it was leased to her, she has sustained damages for which she counterclaims in this action. She alleges that the shaking of the building, caused by the conduct of the automobile business below her, broke and completely destroyed a glass Christ head which she had painted and which was valued at $125. She claims that the expense of moving and installing herself in her new studio amounted to $26, and she also demands compensation in the sum of $30 for the loss of a week's time. The verdict of the jury disallowed all of the claims of the plaintiff and found for the defendant for the full amount counterclaimed. Judgment was accordingly entered in defendant's favor for $181 damages and for $57.97 costs. This is an appeal from such judgment.

For the appellant there was a brief by *Roemer & Aarons,* and oral argument by *C. L. Aarons.*

For the respondent there was a brief by *Nath. Pereles & Sons,* and oral argument by *Clinton G. Price.*

SIEBECKER, J. The law governing the rights and liabilities of landlord and tenant, in cases wherein the tenant asserts eviction from the premises, is that actual expulsion is not necessary, but that any act of the landlord or of any one who acts under authority or legal right given him by the landlord which so disturbs the tenant's enjoyment of the premises as to render them unfit for occupancy for the purposes for which they are leased, is an eviction, and, whenever it takes place, the tenant is released from the obligation under the lease to pay rent accruing thereafter. *Halligan v. Wade,* 21 Ill. 470; *Silber v. Larkin,* 94 Wis. 9, 68 N. W. 406; *Pridgeon v. Excelsior Boat Club,* 66 Mich. 326, 33 N. W. 502; 2 Wood, Landl. & T. (2d ed.) § 477.

The jury were instructed that if they found "from the evidence that the vibration or shaking of the building in which

defendant's studio was situated, which were caused by the conduct of the automobile company, were such that the defendant was thereby prevented from properly carrying on her work as a glass painter, and her paintings thereby became liable to be damaged or destroyed, and said premises thereby made unfit for the purpose of an art studio, so that she had to abandon the same," then the defendant, as lessee, was evicted from the premises. Under this instruction the jury found that she had been evicted. The question then arises: What party is responsible for the injury thus occasioned to the defendant? The trial court instructed the jury that plaintiff was responsible, upon the ground that "under the evidence in this case the presumption stands uncontradicted that the automobile company, under their lease, had a right to test their machines and to do what they did, so far as the evidence shows." This instruction is assailed as not warranted by the evidence. It is claimed that it is shown that the vibration and shaking complained of by the defendant as causing her injury was due to the unusual conduct of those conducting the automobile business, and it is therefore not attributable to plaintiff under the authority given by the lease. It appears that the testing of automobiles caused the trembling complained of. This consisted in running the engines of different machines which were stored in the company's show room, and in starting the engine of any auto car to ascertain whether it was in proper running order and ready for use. Such testing was an incident to the regular conduct of the business of the establishment and was not confined to engines undergoing repairs in the shop. Defendant's room was located over that part of the display room where this testing was done. There is nothing to show, and the trial court so held, that this testing was unnecessary or unusual, but it appeared that under the circumstances it was a necessary part of the conduct of the business. It must, therefore, have been within the contemplation of the parties when the lease of the premises was

made. The evidence also discloses that, upon the complaint of defendant concerning this disturbance in her room, plaintiff investigated the matter and, at the request of the parties conducting the automobile business, came to the defendant's room to observe the effect of such testing. He claimed and asserted that such testing did not interfere with defendant's use of her room, and he did not thereafter take any steps to prohibit the company from continuing to make the tests. Under these facts and circumstances the court did not err in holding that the acts of those in charge of the automobile business were within the rights granted them by plaintiff under the lease to occupy and use the premises to conduct an automobile business. This presumption stands without substantial contradiction in the evidence. It must follow that the instructions upon this branch of the case were correct and that the court properly rejected those requested by the plaintiff.

It is contended that the court erred in striking out that part of the defendant's testimony appertaining to the value of the broken picture to her individually, as a design, apart from its market value. The measure of damages is the pecuniary loss suffered by the breakage, and that would be the diminution in the market value of the article injured. The evidence so stricken out had no bearing on the market value, and the court properly excluded all such evidence. The evidence on the subject tended to show that the picture had no market value after it was broken, and justified the inference that defendant was damaged in the amount claimed.

Another exception argued is to the allowance of expenses incurred in removing from the premises. It is thereby assumed that defendant would have been compelled to incur a like expense at the expiration of her tenancy, and that she cannot be deemed to have been damaged by paying it at the time she did. This assumption is, however, conjectural, for it is far from certain that like expenses would have been in-

curred at the expiration of the tenancy. If she had occupied the premises until the expiration of her lease, various contingencies might have arisen whereby these expenses might have been avoided. This element of damages must be held to have resulted from the wrongful eviction. Her loss of time in her employment on account of such removal is likewise a proper element of recovery resulting from the breach of the obligation.

Exemption from liability is asserted by plaintiff under the provision of the lease wherein it is stipulated that the lessor shall not be liable for any damage occasioned by or from acts particularly mentioned, among which are specified "acts or neglect of cotenants or other occupants." It is obvious that this exemption does not apply to the acts or neglect of such parties authorized or committed under any right given by the plaintiff as lessor of the premises. After examination of the errors assigned we are led to the conclusion that there is no error in the respects alleged.

By the Court.—Judgment affirmed.

HAMANN, Administratrix, Respondent, vs. MILWAUKEE BRIDGE COMPANY, Appellant.

February 24—March 20, 1906.

Master and servant: Negligence: Personal injuries: Fellow-servants: Incompetency: Evidence: Vice-principal: Assumption of risk: Court and jury: Efficient cause of injury: Conjecture: Opinion evidence: Admissibility: Experts: Discretion: Appeal and error.

1. A mere foreman engaged with a crew of assistants, supplied with suitable material and appliances, performing a mere detail of the master's business—removing a machine from a car to the factory,—is a fellow-servant of the members of the crew, and the master is not liable for his fault in failing to choose a proper plan for the removal of the machine, or in omitting to

exercise due care to inform his assistants of the danger of the operation.

2. Incompetence, in the law of negligence, means want of ability suitable to the task, either as regards natural qualities or experience, or deficiency of disposition to use one's abilities and experience properly.

3. In an action against a master for the negligent killing of an employee it appeared, among other things, that the deceased was set at work under the direction of a foreman to unload a heavy machine from a railway car; that the foreman was one of the master's most trusted employees, thirty-seven years old, and had occupied his place of trust and confidence for several years; that at the time of the occurrence he had forty or fifty men under his general charge; that he had a general knowledge of heavy machinery and the manner of moving the same; and that there was nothing in the testimony to suggest incompetence, or impropriety in selecting him to unload the machine. *Held*, that the evidence was insufficient to show that the foreman was incompetent for the work or that the master was negligent in placing the foreman in charge of the work.

4. One in charge of the entire business of a master as general manager is a vice-principal.

5. Where, prior to an accident causing the death of a servant, a general manager of a master arrived on the ground while servants were employed in unloading a heavy machine from a freight car according to plans formulated by a foreman in charge, and assumed charge of the work, the master is chargeable with his knowledge and approval of the manner the work was done the same as if the manager had laid out the plan for the work at the outset, and cannot escape responsibility for what occurred upon the plea that the negligence was that of a foreman—a fellow-servant.

6. In such case the general manager, being chargeable with superior knowledge, when he saw the impropriety of moving the machine without some efficient means to insure against the tipping over which caused the servant's death, should either have stopped further progress until the proper remedy was applied, or have notified the servant of the danger, and, failing so to do, the question of whether there was actionable fault in those regards, or whether such danger as existed in the manner of doing the work adopted was open and obvious to an ordinary man, so that the servant and the master stood on the same plane, were questions for the jury.

7. In an action for the negligent killing of a servant, under the evidence, stated in the opinion, the jury is *held* to have had noth-

ing to guide it except merest conjecture as to how the accident happened, and that therefore there was no efficient basis for a verdict.

8. In an action for the death of a servant, happening while unloading a heavy machine from a freight car, it is error to allow opinion evidence as to whether the manner of moving the machine was proper. Such evidence is *held* to have invaded the province of the jury.

9. Opinion evidence, proper to be given as to the very point the jury is to decide, is confined to cases where such point is clearly within the field of expert evidence and the opinions offered are based on undisputed facts, or assumed facts warranted by the record.

10. The rule allowing opinion evidence as to whether a particular situation is perilous does not extend beyond those situations where the jury, after having all the facts presented to them as clearly as practicable, cannot form an opinion which is as reliable as that of an expert.

11. The scope of expert evidence is not restricted to the field of "science, art, or skill," technically speaking, but extends to every subject in respect to which one may derive, by experience, special and peculiar knowledge.

12. When evidence is excluded because the subject of inquiry is a matter of common knowledge, the real reason for the exclusion is that it is not expert evidence at all.

13. The question of the admissibility of expert evidence as it arises in practice is in the field of competency, and hence the ruling of the trial court thereon, in any case, should not be disturbed except where it appears to be erroneous.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action to recover for a personal injury.

Plaintiff's claim was this: October 7, 1903, the intestate, a common laborer, and to defendant so known, was in the latter's employ with other such laborers under the direction of Meyers, a foreman, performing the service of removing from a railway freight car to the floor of plaintiff's factory a punch machine weighing some 13,000 pounds, and placing the same on the floor of such factory. The machine was wholly of iron, seven feet long and six feet high. Portions thereof were a fly-wheel weighing about a ton and a geared wheel

weighing several hundred pounds, set in a line with the seven-foot base, which was thirty inches wide for about eight inches at each end, and between those points fourteen inches wide. A person familiar with handling such a heavy and peculiarly shaped article was required in order to take the same from the car without danger to unskilled assistants. Defendant, well knowing that, employed said Meyers to superintend the work, who was known to be incompetent therefor. By aid of his assistants he caused a skidway, eighteen feet long, to be constructed, reaching from the doorway of the car to the floor of the factory. It was composed of 12 x 9 inch timbers placed parallel to each other and about fifteen inches apart, fastened at both ends and blocked under the center. The crew placed the machine on the skidway by mechanical means, and put rollers thereunder. A rope was attached to the body thereof and to the car so as to control the motion of the same as it proceeded down the skidway. When everything was in readiness for the machine to so move, the foreman took a position in front thereof on the west side of the skidway, and the deceased, by direction, took a corresponding position on the east side. Another person was located behind the machine, to pick up rollers as they were released by the forward motion, and pass them to the persons in front whose duty it was to receive and place them before the machine, and guide them till firmly engaged thereby. The form of the machine was such that, except when the rollers were near the outer ends of the base, the bearing thereon was only about fourteen inches wide, and when all rollers were so circumstanced the weight of the machine was so distributed that the center of gravity was on a line perpendicular with a point outside the base. That fact was unknown to the deceased, and not apparent to an ordinary workman. It occurred during the progress of the work that the machine rested wholly on rollers located under the narrow part of the base, when by reason of the facts aforesaid it naturally tipped sideways and in the direction of plaintiff's

intestate. Before he could, in the exercise of ordinary care, escape from the danger he was caught thereby and killed.

There were other allegations as to the existence of a statutory beneficiary, giving rise to a complete cause of action in case of the defendant being liable for the death, and allegations showing performance of all conditions precedent to the prosecution thereof.

Two causes of action were stated, one being predicated on negligence in putting an incompetent man in charge of the work, and in failing to warn the deceased of the danger because of the center of gravity of the machine falling outside of the narrow part of the base, and in moving the machine in an improper way and by an improper plan; and the other substantially thereon except the element regarding employment of an incompetent foreman.

The defendant put in issue the allegations of negligence, denied that a perpendicular line downward from the center of gravity fell outside the narrow base, and alleged that the length of the machine was five feet instead of seven feet; its width at the narrow part of the base to be seventeen instead of fourteen inches; the weight of the fly-wheel to be one half that alleged; the center of gravity of the machine to be in a plane perpendicular with the center of the base; and that it was moved with due regard to the safety of all the persons engaged in the work.

The evidence was to this effect: The age of the deceased, at the time of the accident, was about forty-nine years, and that of the foreman thirty-seven years. The former was a common laborer, who had worked for defendant about two weeks and was a man of ordinary intelligence, and the latter had been in defendant's employ some over two years. He had charge of forty to fifty men. He had never prior to the accident moved or assisted in moving a machine precisely like the one in question, but was familiar, in a general way, with heavy machinery and the manner of handling the same. No

accident had previously occurred in doing work under his charge. He was a man of considerable experience in handling heavy articles. On the day in question, by direction of the superintendent of defendant's business, he selected a crew of men to work under his charge in unloading the machine. He procured the necessary material and appliances therefor. Therewith the crew, under his direction, constructed a skidway of the character stated in the complaint. It was of sufficient strength for the purpose for which it was designed. It was firmly secured at both ends and supported in the middle so as to bear up the machine without being displaced in any respect. The plan of the work was wholly laid out by the foreman. He first caused the machine to be placed in proper position to pass out the door of the car onto the skidway. It was then raised and four or five rollers were placed thereunder. They were four feet long or over and four to six inches in diameter. A rope was attached to the machine and the free end was then carried back through the car, down and twice around the truss thereof and thence to the hands of one of the assistants, charged with the duty of releasing it slightly, at intervals, as directed to do so, when it was desired to move the machine forward. The foreman and the deceased took positions in front of the machine, one being on each side of the skidway, for the purpose of replacing rollers thereunder as they were released at the rear and passed forward by a person located there for that purpose. The machine weighed about 6,000 pounds. From the base to the top of the frame it was five feet, from the former to the top of the geared wheel it was about five feet and ten inches. It was five feet long at the base, thirty inches wide at the ends thereof for a distance of about seven inches, and otherwise it was sixteen inches wide. The base was hollow. The weight was so distributed that the center of gravity was about at the intersection of a line passing through the machine widthway two feet from one end and three from the other, and a line passing

through lengthwise in the middle, both lines being about forty inches above the bottom. It could not tip over without being turned from an upright position sufficiently to move the center of gravity to one side a distance of about eight inches. The exact situation in respect to such center was not observable by ordinary observation by reason of the hollow base, which was obscured. All members of the crew worked together in preparing to move and in moving the machine. It was transported successfully about halfway down the skidway, when Mr. Fitzsimmons, the superintendent of the business, came upon the scene. He immediately observed that one of the rollers was not exactly in proper place, and directed the foreman's attention thereto. Thereupon, the latter, with the assistance of deceased, remedied the matter. The man in charge of the rope, by direction, then released it sufficiently to allow the machine to move forward a short distance. As the work proceeded and the foreman and deceased were holding a roller in position for the advancing machine to engage it, the machine commenced slowly to tip toward the east. The superintendent, who had remained by from his aforesaid advent upon the scene, watching the progress of the work, first observed the tipping of the machine and immediately thereupon called out the danger. The deceased instantly side-stepped to escape from the reach of the machine, but, by mistake, proceeded in the wrong direction, resulting in his being struck and killed. The skidway on the side of the tipping did not settle or move out of place in any respect. The safety rope, so far as observed, did not fail in any respect to serve the purpose for which it was designed. There was no disturbance at any point connected with the movement of the machine, so far as any one observed, causing it to fall. Neither the foreman nor any one present was able to explain the occurrence after it happened. There was evidence that the base of the machine should have been skidded so as to afford a broader rest upon the rollers. Expert evidence was allowed under objection,

that the way the work was done was dangerous. There was no evidence that it was a faulty manner in any respect except in that a false base was not constructed to give broader support to the machine. As to whether the method of moving it was proper the evidence was conflicting. Though there was evidence that the machine, supported only on the narrow base, would have a tendency to tip over, it was established that the center of gravity was on a line perpendicular with the center of the base as before indicated.

At the close of the evidence there was a motion for a directed verdict in favor of the defendant, which was denied.

The cause was submitted to the jury for a special verdict with this result:

(1) The deceased was killed as alleged in the complaint. (2) The method adopted of moving the machine was not reasonably safe. (3) The foreman was incompetent. (4) Defendant knew that fact. (5) It ought, in the exercise of ordinary care, to have known it. (6) It was guilty of a want of ordinary care in entrusting the work to Meyers. (7) Such want of ordinary care was the proximate cause of the intestate's death. (8) The superintendent ought to have observed the dangerous manner in which the machine was being moved. (9) The deceased is not chargeable with knowledge that the manner of work was dangerous. (10) The superintendent ought to have known that deceased did not comprehend the danger. (11) The superintendent was guilty of a want of ordinary care in not warning deceased of the danger. (12) Such want of ordinary care was a proximate cause of the injury. (13) The deceased is not chargeable with knowledge that the foreman was incompetent. (14) The deceased was not guilty of any want of ordinary care contributing to his injury. (15) The amount of recoverable loss, if any, is $3,500.

There was a motion to change the second finding to the affirmative, to change the third, fifth, sixth, seventh, eighth,

tenth, eleventh, and twelfth findings to negatives, and to change the thirteenth and fourteenth findings to affirmatives, because the evidence established the facts so to be, and for judgment in defendant's favor. The motion was denied. There was also a motion on behalf of the defendant on several grounds, to set aside the verdict and for a new trial, which was denied. Judgment was thereupon, on motion, rendered in plaintiff's favor and defendant appealed.

For the appellant there was a brief by *Vilas, Vilas & Freeman,* and oral argument by *E. P. Vilas.*

For the respondent there were briefs by *Houghton & Neelen,* and oral argument by *F. W. Houghton.*

MARSHALL, J. Meyers was a fellow-servant of deceased. That seems plain. He was a mere foreman engaged with a crew of assistants, supplied with suitable material and appliances, in performing a mere detail of appellant's business. It is not claimed, as we understand it, that he was guilty of any fault other than in failing to choose a proper plan for accomplishing the removal of the machine from the car, and omitting to exercise due care to acquaint his assistants of the dangers of the operation, in the way it was done. Those were mere incidents of the work, the same as constructing the skidway, arranging the rope to control the movement of the machine, locating the men in their proper places to assist in the work, and directing them generally in and about the same. In all cases of that sort the foreman is a mere comrade with the men under him. The fault, if there is any, so long as there is no precedent want of care in his employment, is that of a fellow-servant, for which the master is not liable. Such fault is one of the ordinary risks assumed by an employee as a part of his contract. The facts of this case are so clearly within that principle, and the rule itself is so familiar, that it seems useless to discuss the matter. The following cases are directly in point: *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338, 21

N. W. 269; *Portance v. Lehigh Valley C. Co.* 101 Wis. 574, 579, 77 N. W. 875; *Wiskie v. Montello G. Co.* 111 Wis. 443, 87 N. W. 461; *Williams v. North Wis. L. Co.* 124 Wis. 328, 102 N. W. 589; *Alaska M. Co. v. Whelan,* 168 U. S. 86, 18 Sup. Ct. 40.

As to whether the foreman was incompetent, or if he was, defendant was negligent in directing him to do the work, we fail to find any warrant for the verdict independently of what occurred on the occasion in question. It is undisputed that he was one of the most trusted employees engaged in appellant's large business. He had forty or fifty men under his general charge at the time of the occurrence. That place of trust and confidence he had filled for a considerable period of time. He was thirty-seven years of age. As indicated in the statement, he had a general knowledge of heavy machinery and the manner of moving the same, and there was nothing in his history to suggest incompetence, or impropriety in selecting him to unload the machine. Incompetence, in the law of negligence, means want of ability suitable to the task, either as regards natural qualities or experience, or deficiency of disposition to usé one's abilities and experience properly. *Maitland v. Gilbert P. Co.* 97 Wis. 476, 72 N. W. 1124; *Kliefoth v. N. W. I. Co.* 98 Wis. 495, 74 N. W. 356. The evidence here, as to occurrences up to the time the foreman was directed to do the work, not only does not prove he was incompetent for the task, but rather proves affirmatively the contrary. We are unable to find a scintilla of evidence of any circumstances calculated, reasonably, to put appellant on guard against doing what it did in that regard. It had good reason to believe that he possessed all the ability, the experience, and the disposition requisite to the proper performance of the undertaking.

Aside from the circumstance of the superintendent coming upon the ground before the accident in ample time to have remedied the dangerous way the machine was being

moved, if there were fault in that regard, either by counteracting, in some way, the tendency thereof to tip over by a moderate disturbance of the same, if such tendency existed, or by specially warning the employees of the danger, no cause of action was established by the evidence. Fitzsimmons was not a foreman. He did not engage in any way as a fellow-servant in moving the machine. He had charge of the entire business as general manager and was a vice-principal most clearly. He arrived on the scene, as indicated in the statement, when the machine was about halfway down the incline. He saw the whole situation at a glance, and must have then comprehended whatever dangers were incident to the work in the way it was being conducted, noticeable to a man of ordinary care circumstanced as he was. In any event, he is chargeable with having so comprehended, and that is imputable to the defendant. As soon as he arrived, as we have seen, he directed replacement in proper position of one of the rollers, and thereafter remained by, closely observing the work, till the accident occurred. He was the first to note the tipping of the machine and to give notice thereof to those who were within the region of danger. Prior thereto he made no suggestion of danger in continuing the work as he found it in progress. It seems that he virtually took charge thereof upon his arrival, but in any event he could not stand by, as he did, and defendant escape responsibility for what occurred upon the plea that the negligence, if negligence there were, was that of the foreman, a fellow-servant. The authority cited to our attention with much confidence on this, *Ziegler v. Day,* 123 Mass. 152, does not appear to be at all in point. The superintendent, there spoken of, was a mere foreman, the principal was not on the ground at the time of the accident, or prior thereto, so as to be chargeable with knowledge of the manner the particular work was done which led to the happening of the accident. Not so here, as indicated.

Here the principal in the person of Fitzsimmons was on

the ground. Through him it knew and approved of the manner of the work before the accident. It is, therefore, chargeable the same as if its superintendent had laid out the plan for doing the work at the outset, leaving as matter of detail, only the execution thereof.

The question of whether such danger as existed in the manner of work adopted was open and obvious to an ordinary man, so that the deceased and appellant stood on the same plane, was at least for the jury. There is reasonable ground for saying the machine was of such shape and character, particularly on account of the hollow base, the extent thereof, and the location of the center of gravity some forty inches above the same, or within about twenty inches of the top of the framework, that an ordinary man might not have comprehended the extent of disturbance liable to cause it to tip over, or the danger of such disturbance occurring under the circumstances, while such danger might have been plain, or reasonably so, to one familiar with such a machine. If Fitzsimmons, as one chargeable with such superior knowledge, saw or ought to have seen the impropriety in moving the machine without some efficient means to insure it against tipping over, he should have called attention thereto as soon as he had reasonable opportunity therefor, and either stopped the further progress of the work till the proper remedy was applied, or notified those who were at the work of the danger. He did neither, so far as appears. By his attitude he approved in every respect of the manner the work was being done. That might well have been regarded as an assurance of safety by the inexperienced men. Upon the trial he still insisted that the method of work was proper. Whether there was actionable fault in that regard, it seems, was a fair jury question.

Manifestly, the result on the last point treated is not material, unless there is evidence warranting a finding that the machine tipped over by reason of the rollers being only under the sixteen-inch base. Bearing in mind that, according to the

evidence, there was no disturbance whatever of the east side of the skidway preceding or during the progress of the accident; that at the instant the machine began to tip and until it was wholly out of balance, the skidway was in perfect form, and the rollers likewise, and that the event took place without anything suggesting the probability of the thing happening before it occurred, or anything explaining it thereafter, it stands, so far as explained by witnesses, as a miraculous occurrence. One may conjecture how it occurred, but that is all.

Counsel for respondent comprehended the difficulty suggested at the time of drafting the complaint and solved it, seemingly, upon the theory, in good faith, that when the machine rested wholly on the narrow base the center of gravity was on a line perpendicular with a point outside thereof. However, a little reflection is sufficient to convince one that it could not have been on a line perpendicular with a point outside of the base on both sides. Therefore it must be assumed that the pleader supposed the machine was much heavier on one side than on the other: of which there is no support whatever in the evidence. One or two witnesses testified, in effect, that the center of gravity was somewhat on a balance so that a slight displacement of the machine was sufficient to disturb its equilibrium, and so counsel for respondent now claims; but we find no evidence whatever to support any such theory. The pictorial representation of the machine, in connection with the evidence, shows beyond any room for controversy that it was perfectly balanced, one side being the same weight as the other, with the center of gravity located some forty inches above the base and on a vertical line from the center thereof.

It does not require evidence from the mouths of witnesses to picture to the mind the position the machine must necessarily have assumed before the vital gravity point could have been on a line perpendicular with one outside the base, throw-

ing the machine so out of balance as to cause it to tip over. That is a matter of such exact demonstration that any amount of evidence from the mouths of witnesses to the contrary could not change it. It is one of those situations which is not only unimpeachable but will impeach all evidence contradicting it.

Assuming, as we must, from the evidence, that the side of the skidway remained in proper position, the highest point on the machine: the top of the geared wheel must have moved to the east about a foot, the top of the frame not much less, and the west projection of the base raised some four inches, before the apparatus became out of balance. As it weighed nearly 6,000 pounds it can easily be seen it would not have been possible to tip it over by any disturbance the evidence discloses occurred.

Each side of the machine weighed nearly 3,000 pounds. It would not be a very easy task for one to upset such a body so located. If the skid on the side towards which the machine tipped had settled a very few inches, what occurred would have been inevitable. However, as the case stands, as before indicated, the occurrence is wholly unexplained. The jury had nothing to guide them but the merest conjecture. That furnishes no efficient basis for a verdict. *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36; *Mueller v. Milwaukee,* 110 Wis. 623, 86 N. W. 162.

As said in the first case above cited, it is incumbent on the plaintiff, in a case like this, to show with reasonable distinctness how and why the accident occurred. It will not do to merely present to a jury a state of facts involving a claim for damages for a personal injury, and relations of the parties which would, under some circumstances, render the defendant liable, without any proof whatever, or any reasonable definite proof, of the existence of such circumstances, and then leave it to the jury to guess whether they did or did not exist in fact, and to base a verdict upon the result. Unless the evi-

dence, in respect to such a matter, is sufficient, clearly, to remove the truth of the matter from the realms of mere conjecture into those of reasonable probability, no question in respect thereto is presented for solution by the jury,—only a question of law for the court.

It was error to allow opinion evidence as to whether the manner of moving the machine was proper. This has reference to considerable expert evidence permitted under objection, that the work was done in a dangerous way. That invaded the province of the jury. There are instances in which opinion evidence may properly be given as to the very point the jury are to decide. *Maitland v. Gilbert P. Co.* 97 Wis. 476, 72 N. W. 1124; *Lyon v. Grand Rapids,* 121 Wis. 609, 619, 99 N. W. 311. They are confined to cases where such point is clearly within the field of expert evidence and the opinions offered are based on undisputed facts, or assumed facts warranted by the record.

Where a matter relates to whether a particular machine, place, or mode of doing business is dangerous, and such danger is not sufficiently latent but what the jury can as well form a reliable opinion in respect thereto as an expert, when put in possession of all the facts causing the peril, and that can readily be done, opinion evidence is not admissible. This court has, quite recently, on two occasions, so ruled. *Olwell v. Skobis,* 126 Wis. 308, 105 N. W. 777; *Anderson v. Chicago B. Co., ante,* p. 273, 106 N. W. 1077.

The rule allowing opinion evidence as to whether a particular situation is perilous in some cases, is quite familiar, but it will be found, it is thought, on examination of the authorities, not to extend beyond those situations where the jury, after having all the facts presented to them as clearly as practicable, cannot form an opinion which is as reliable as that of the expert. The following are examples of where such evidence has been held proper, or illustrate the principle of the rule: *Innes v. Milwaukee,* 103 Wis. 582, 79 N. W. 783;

Daly v. Milwaukee, 103 Wis. 588, 79 N. W. 752; *Ogden v. Parsons,* 23 How. 167; *Transportation Line v. Hope,* 95 U. S. 297; *Spring Co. v. Edgar,* 99 U. S. 645; *Union Ins. Co. v. Smith,* 124 U. S. 405, 8 Sup. Ct. 534; *Lewis v. Seifert,* 116 Pa. St. 628, 11 Atl. 514; *Huizega v. Cutler & S. L. Co.* 51 Mich. 272, 16 N. W. 643; *Louisville, N. A. & C. R. Co. v. Frawley,* 110 Ind. 18, 9 N. E. 594; *Pullman P. C. Co. v. Harkins,* 55 Fed. 932, 5 C. C. A. 326. Such evidence as that under consideration is not inadmissible merely because the subject matter is outside of the field of "science, art, or skill" technically speaking. The scope of expert evidence is not thus restrained. It extends to every subject in respect to which one may derive, by experience, special and peculiar knowledge. *Schwantes v. State, ante,* p. 160, 106 N. W. 237; Lawson, Exp. Ev. 239; 1 Wharton, Ev. (3d ed.) § 44. When the evidence is excluded because the subject of the inquiry is a matter of common knowledge, as it sometimes is, the real reason of the exclusion is that it is not expert evidence at all. It is not all opinion evidence that is expert evidence nor is all the latter admissible, as one may give an opinion as to a matter known to people generally. The opinion must fall within the field of expert evidence to be admissible. In short, it must be an expert opinion, and then it is not necessarily admissible. It should be excluded, as we have seen, as to some subjects, when the jury can be afforded an opportunity to form an opinion as intelligent and reliable as the expert, and when that is clearly so it is harmful error to admit it.

Just when the rule above discussed applies and when it does not, strictly on principle, is somewhat difficult to determine. The question as it arises in practice is in the field of competency, and therefore the ruling of the trial court, in any case, should not be disturbed except where it appears pretty clearly to be erroneous. Such appear to be the rulings under consideration in the light of the recent decisions of this court

to which we have referred. They must be read, however, having regard to the rule that such opinion evidence, in a proper case, is permissible. There was no difficulty whatever, in the instances in question, in explaining to the jury all of the elements rendering the manner of doing the work adopted perilous, which were not matters of common knowledge. Placed in possession of such elements, the result was governed by natural laws of a familiar character. The proof should have been made in that way with other of the general manner, if there be such, of doing like work, and then it should have been left to the jury to determine whether ordinary care was exercised in respect to the method adopted for moving the machine or not.

The general result is that the judgment appealed from must be reversed and the cause remanded for a new trial.

By the Court.—So ordered.

JACOBSON, Appellant, vs. BENTZLER, Respondent.

February 26—March 20, 1906.

Checks: Delivery: Acceptance: Sunday contracts: Ratification: Pleading: Public policy.

1. The acceptance of a check on a bank is in the nature of a conditional payment, which becomes complete when accepted, and, when the amount due thereon is actually paid, such payment relates back to the time of its delivery.
2. Plaintiff loaned defendant $1,000, the transaction taking place on Sunday, and consisted of delivery and receipt of a check for that amount and of an agreement expressing the conditions of the loan. Thereafter the defendant cashed the check and had the agreement acknowledged and left for record, with directions to the register to mail it to plaintiff. *Held*, that the collection of the money on the check, and the acknowledging, recording, and transmission of the agreement, were mere incidents to the trans-

action constituting the making of the loan, and did not relieve the transaction from the operation and condemnation of the law respecting contracts executed on Sunday.

3. In such case the obligation for repayment arose out of what took place on Sunday, and that agreement is void and not susceptible of ratification.

4. In an action to enforce such loan the fact that such invalidity was not asserted in the answer does not preclude defendant from insisting that the agreement cannot be enforced, since, on the ground of public policy, all the parties to the agreement are deemed equally guilty and are denied the usual remedies of the law for its enforcement.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Plaintiff alleges that he loaned and advanced defendant the sum of $1,000 and that defendant agreed to repay the sum on demand. He claims that demand has been made and that no part of the sum has been paid. Defendant denies that a loan was ever made, and alleges that he conveyed certain real estate to the plaintiff in consideration of the $1,000. He further alleges that the deed was executed and delivered upon an express agreement in writing that upon repayment of the sum, and provided he had paid the taxes levied on the property, he might demand a reconveyance, but that in case of failure to pay such taxes then the contract was to be null and void. He alleges that he has not paid the taxes and that the right to demand a reconveyance no longer exists, and he asserts that plaintiff has not offered to reconvey. The evidence on the trial shows that all of the transactions involved took place on Sunday, including the delivery of the check for $1,000, the signing and delivery of the written agreement, and the delivery of the deed. The only act not positively shown to have taken place on Sunday refers to the acknowledgment and the recording of the deed, and this is left in uncertainty by the statements of the plaintiff. At the conclusion of plaintiff's evidence defendant's motion for a nonsuit

was granted by the court. A motion for a new trial was denied, and judgment for costs was rendered for defendant. This is an appeal from such judgment.

J. A. Eggen, for the appellant.

For the respondent there was a brief by *McElroy, Eschweiler & Wetzler,* and oral argument by *S. F. Wetzler.*

SIEBECKER, J. The evidence of the plaintiff shows that the transactions on which relief is sought took place between the parties on Sunday. It is undisputed that plaintiff on this day delivered to and that defendant received from him a check for $1,000; that the written agreements expressing the conditions of the loan were executed and delivered on Sunday; and that the deed, which had been signed by the grantor, was handed to plaintiff on the same day. The only part of the transaction which occurred thereafter was that the defendant had the deed acknowledged and left for record, with directions to the register of deeds to mail it to the plaintiff. The time of payment of the check and the acknowledgment and recording of the deed are relied on as showing that the alleged loan was not made on Sunday: Firstly, upon the ground that the alleged loan to defendant was not made until the check had been paid at the bank; and, secondly, it is claimed that the loan was not made until the deed was acknowledged, recorded, and transmitted by mail to plaintiff, and that these acts were essential to the delivery of the deed and were necessary steps to give legal efficacy to the transaction. As to the first point it seems clear that acceptance of a check on a bank is in the nature of a conditional payment, which becomes complete when accepted and when the amount due on it is actually paid, and that such payment relates back to the time of its delivery. 22 Am. & Eng. Ency. of Law (2d ed.) 569; 2 Daniel, Neg. Inst. (5th ed.) § 1623. Under the circumstances shown, the fact that defendant received the money on the check after Sunday does not relieve the transaction from

the operation of the Sunday law. The same is true with respect to the acknowledgment, the recording, and the transmission of the deed. These were mere incidents to the transaction which constituted the making of the loan. The alleged obligation for the repayment of the money loaned arises out of what took place on Sunday.

Plaintiff is not relieved from difficulty by the claim that the acts done after Sunday were in the nature of a ratification of that which preceded, for it has been held that the loaning of money on Sunday is within the meaning of the statute prohibiting the doing of business on the first day of the week. This makes the contract void and not susceptible of ratification. *Troewert v. Decker,* 51 Wis. 46, 8 N. W. 26; *Brown v. Gates,* 120 Wis. 349, 97 N. W. 221, 98 N. W. 205, and cases cited; *Vinz v. Beatty,* 61 Wis. 645, 21 N. W. 787; *Sherry v. Madler,* 123 Wis. 621, 101 N. W. 1095. The fact that defendant in his answer did not assert the invalidity of the contract upon the grounds now advanced does not preclude him from insisting that the agreement cannot be enforced. Upon the ground of public policy, all the parties to such an agreement are deemed equally guilty and are denied the usual remedies of the law for its enforcement. *Pearson v. Kelly,* 122 Wis. 660, 100 N. W. 1064.

The judgment dismissing the action was properly awarded.

By the Court.—Judgment affirmed.

BARRY, Administratrix, Respondent, vs. MINAHAN, Administrator, Appellant.

February 26—March 20, 1906.

Loans payable on demand: Accrual of cause of action: Estates of decedents: Claims: Filing: Statutes of nonclaim: Limitation of actions: Husband and wife: Appeal and error: Findings.

1. A cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it.
2. A cause of action to recover for money loaned, payable upon demand, accrues at the time of the loan.
3. Where a wife, one year prior to her death, loaned her husband money payable on demand, her rights thereunder against the husband accrued prior to her death and passed to her estate as a valid and existing cause of action.
4. In such case, the husband having died subsequent to the death of his wife, the estate of the wife is "a creditor of" and "a person having a claim against" his estate, within the calls of the statutes governing the administration of estates of decedents.
5. In such case the representative of the wife's estate having failed to file such claim against the husband's estate for more than two years after the time limited by the proper county court under sec. 3840, Stats. 1898, the claim is barred under the provisions of sec. 3844, Stats. 1898.
6. Such bar is not affected by the fact that there has been an unsuccessful attempt, by a son of the wife, to have a trust declared as to the same claim for the amount thereof against the husband's estate, which was defeated on the ground that no trust existed, although the son, as her heir, might profit by the recovery, since that was a different cause of action and prosecuted in a different right.
7. The filing of a claim by the administratrix of a deceased wife against the estate of the husband for money loaned by the wife to the husband is not an action between the wife and husband, and does not prevent the operation of sec. 3844, Stats. 1898, that section containing no specific exemption in favor of married women.
8. Where the trial court has refused to find that any fraud existed, and there is nothing in the record which would entitle the party alleging fraud to relief on that ground, the action of the court will not be disturbed.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Catherine Minaghan died in 1893, leaving her surviving a minor son, her only heir at law, and her husband, John Minaghan, who died in 1901. Immediately after the death of John Minaghan an administrator was appointed, who later resigned, and *Wm. B. Minahan* was appointed administrator *de bonis non.* An order was made on the 11th day of June, 1901, for the presentation of claims, limiting the time to and including the 6th day of January, 1902. Notice of such order was published in the usual manner, and the proof of publication filed with the county court. Before the time for the presentation of claims against the estate of said John Minaghan expired, the minor son, through his guardian *ad litem,* filed a claim with the county court of Calumet county against the estate of his father, alleging that $800 had been placed in the hands of said John Minaghan about one year prior to his mother's death in trust for said minor, and asking that the trust be declared and established in his favor. The county court gave judgment in favor of the minor, which judgment was affirmed on appeal to the circuit court, and reversed by the supreme court, the supreme court holding that upon the case made no trust was created, but that the facts established showed a loan from Catherine Minaghan to her husband, and that the relation of debtor and creditor existed. *McKinney v. Minahan,* 119 Wis. 651, 97 N. W. 489. After the decision of the supreme court, and in February, 1904, Theresa Barry was appointed administratrix of the estate of Catherine Minaghan, and filed a claim as such administratrix in the probate court of Calumet county, setting up the former proceedings for the establishment of a trust in favor of the minor, and further alleging that $850 was loaned to John Minaghan prior to the death of Catherine upon his promise to repay the same with interest on demand, which money was the sole and separate property of said Catherine. It further appears from

the petition that no final accounting, final order, or decree of distribution had been made or entered at the time of filing the petition or claim, and that no part of the $850 had been repaid to Catherine or her estate. Upon this petition an order to show cause was made and served upon the administrator *de bonis non* of John Minaghan, deceased, and his attorney, and they appeared and made defense in the county court, denying that anything was due, and setting up failure of the petitioner to present her claim against the estate within the time required by law, which expired January 6, 1902. The matter was heard and the county court disallowed the claim, and on appeal to the circuit court the judgment of the county court was reversed, the circuit court holding that the claim did not accrue until the appointment of *Theresa Barry* as administratrix February 18, 1904, and that there being no person in existence having said claim, the statute of limitation and the order of the county court limiting the time to present claims in said estate matter did not apply or bar the claim, and ordered that plaintiff recover from the estate the sum of $832.50 and interest, with costs and disbursements. The circuit judge filed his decision in writing, and made his findings of fact and conclusions of law, ordering judgment for plaintiff for the amount claimed, with interest and costs. Judgment was entered accordingly for the sum of $1,490.08, from which judgment this appeal was taken.

V. I. Minahan, for the appellant.

James Kirwan, for the respondent.

KERWIN, J. The question raised by the first assignment of error and the controlling one upon this appeal is whether the claim of the respondent was barred because not presented to the county court within the time allowed by the order for the presentation of claims against the estate of John Minaghan, deceased. The time fixed by the order expired on the 6th day of January, 1902, and the claim of the respondent

was presented by petition in February, 1904. The claim is based upon a loan made by Catherine Minaghan to John Minaghan, her husband, about a year before her death, payable on demand. The petition for the allowance of the claim alleged these facts and the testimony tended to establish them. The respondent's claim, therefore, is based upon a loan which was due and enforceable before the death of John Minaghan or his wife, Catherine Minaghan. Upon well-established principles of law, the cause of action to recover money loaned upon demand accrues at the time of the loan. *Hall v. Letts*, 21 Iowa, 596; *Ware v. Hewey*, 57 Me. 391; *Kimball v. Kimball*, 16 Mich. 211; *Cook's Adm'rs v. Cook*, 19 Tex. 434; *Baxter v. State*, 17 Wis. 588; *Curran v. Witter*, 68 Wis. 16, 31 N. W. 705; *Schriber v. Richmond*, 73 Wis. 5, 40 N. W. 644; *Turner v. Iron Chief M. Co.* 74 Wis. 355, 43 N. W. 149.

"A cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it." *Murphy v. Omaha* (Neb.) 95 N. W. 680; *Arnold's Heirs v. Arnold* (Ky.) 82 S. W. 606; 19 Am. & Eng. Ency. of Law (2d ed.) 193; *Weiser v. McDowell*, 93 Iowa, 772, 61 N. W. 1094; *Smith v. Bythewood*, Rice, Law (S. C.) 245, 33 Am. Dec. 111.

The cause of action set up in the petition and claim filed existed in favor of Catherine Minaghan, and was capable of being enforced by her for a period of about a year before her death, and was during such time an accrued, valid, and existing cause of action, which she had a right to enforce. She had from the time of the loan down to the time of her death a present right to enforce the claim against her husband, and it passed to her estate an accrued claim against her husband, and at the time of his death was a valid, existing claim against his estate. The court below held that the claim was enforceable against the estate of John Minaghan, deceased, notwithstanding it had not been presented during the time

required by the order for the presentation of claims, upon the theory that it did not accrue against the estate of John Minaghan, deceased, until a personal representative of the estate of Catherine Minaghan had been appointed, and therefore was not barred, on the authority of *Stehn v. Hayssen,* 124 Wis. 583, 102 N. W. 1074. But it will be seen that in the *Stehn-Hayssen Case* the cause of action did not arise until after death, and there this court held that a cause of action which arises after death cannot accrue until there is some person in existence who can bring it, and that there is no person in existence to bring an action in favor of the estate of a deceased person which arises after death until an executor or administrator is appointed. The court below obviously overlooked the distinction between causes of action arising after death and those accruing before death. In the former there is no person in existence who can bring the action until an executor or administrator is appointed, while in the case at bar there was a person capable of suing, a person to be sued, and an existing accrued cause of action. The distinction is clearly recognized in the statute (secs. 3840, 3844, 3860, Stats. 1898). The former sections (3840 and 3844) plainly make provision for accrued claims, while sec. 3860 provides for claims which accrue or become absolute after the time limited for creditors to present their claims, and further provides that the same may be presented and proved at any time within one year after they shall accrue or become absolute. It is therefore very clear that *Stehn v. Hayssen, supra,* does not apply to causes of action which accrue before death, and which are valid existing causes of action capable of being enforced before the death of the party against whose estate they are filed. In other words, the statutes contemplate two classes of claims: first, those accrued and existing at the time of death; and, second, those which accrue or become absolute after death; and it was held in the *Stehn-Hayssen Case* that a cause of action which arises after death cannot accrue until

there is some person in existence who can bring it. *Stehn v. Hayssen, supra,* has reference to cases falling under sec. 3860, Stats. 1898, which accrue or become absolute after death, and the doctrine of that case is well supported by the authorities, some of which are referred to in the opinion of the court, but it is very clear that such cases have no reference to a case like the one at bar. *Bucklin v. Ford,* 5 Barb. 393; *Sanford v. Sanford,* 62 N. Y. 553; *Baker's Adm'r v. Baker's Adm'r,* 13 B. Mon. 406. The decision in *Stehn v. Hayssen, supra,* is strictly confined to causes of action which arise after death, and, therefore, has no application here where the cause of action accrued before the death of either Catherine Minaghan or her husband, John Minaghan. The question, therefore, is whether the respondent has become barred because of failure to present the claim set forth in the petition as required by sec. 3844, Stats. 1898. Sec. 3840, Stats. 1898, provides:

"At the time of granting letters testamentary or of administration the county court, by order, shall fix a time, not less than six months nor more than one year thereafter, as the circumstances of the case may require, within which creditors shall present their claims for examination and allowance. . . . "

Sec. 3844, Stats. 1898, provides:

"Every person having a claim against a deceased person, proper to be allowed by the court, who shall not, after notice given as required by sec. 3839, exhibit his claim to the court within the time limited for that purpose shall be forever barred from recovering such demand or from setting off the same in any action whatever."

The rule is well established that words in a statute must receive a general construction, unless there is in the statute itself some ground for restraining their meaning by reasonable construction, not by arbitrary addition or retrenchment. The statute here contains no exception, but provides that every person having a claim, proper to be allowed, who shall not present it within the time limited, shall be forever barred.

Such statutes are known as "statutes of nonclaim," and are generally applied more rigorously than the general statutes of limitation, and in the absence of a saving clause run against all persons. *Winter v. Winter,* 101 Wis. 494, 77 N. W. 883. Such statutes have been held to bar married women, infants, and nonresidents, where there is no saving clause in their favor. 2 Woerner, Adm'n (2d ed.) § 402, and cases there cited; *Richardson v. Harrison,* 36 Mo. 96; *Rowell v. Patterson,* 76 Me. 196; *Erwin v. Turner,* 6 Ark. 14; *Morgan v. Hamlet,* 113 U. S. 449, 5 Sup. Ct. 583; *Van Steenwyck v. Washburn,* 59 Wis. 483, 17 N. W. 289. And, where a claim is a proper one to be presented against an estate, it must be presented or is forever barred. *Carpenter v. Murphey,* 57 Wis. 541, 15 N. W. 798; *Austin v. Saveland's Estate,* 77 Wis. 108, 45 N. W. 955; *Ernst v. Nau,* 63 Wis. 134, 23 N. W. 492.

But it is argued that notice was not duly given as required by sec. 3840, Stats. 1898. We have carefully examined the order and notice, and are unable to discover that the statute has not been complied with. Counsel in his argument insists that the order should contain more than the statute requires. Sec. 3840, Stats. 1898, in effect, provides that the county court, by order, shall fix a time, not less than six months nor more than one year thereafter, within which creditors shall present their claims for examination and allowance, and that the court shall fix by the order a time after presentation of claims for the examination and adjustment of any claims presented, and that notice of the time within which creditors may present their claims, and when the same will be examined and adjusted, shall be given by publication for four successive weeks, or in such other manner as the court may direct, the first publication to be within fifteen days of the date of the order. The order made, as appears from the record, fully complies with the provisions of this statute, and it appears to have been published in the manner prescribed. The order

was made on the 11th day of June, 1901, and provided that the time allowed for creditors to present their claims for examination and allowance is limited from the date thereof until and including the 6th day of January, 1902, and further ordered that the claims and demands of all persons against deceased be examined and adjusted by the court at the regular term thereof to be held at the office of said county judge in the city of Chilton, said county, on the first Tuesday in January, 1902, and that notice be given by publication of the order for four successive weeks, once in each week, in the Chilton Times, a newspaper published in said county, the first publication to be within fifteen days from the date of the order. This appears to be a sufficient compliance with the statute. It is further insisted that an estate is not a "person having a claim" within the meaning of sec. 3844, Stats. 1898, requiring "every person having a claim against a deceased person" to exhibit the same within the time limited, and hence the claim of Catherine Minaghan's estate in question was not barred. Catherine Minaghan's claim against her husband accrued before her death, and at the time the order was made and notice given her estate was a creditor, and the statute on the subject (secs. 3840, 3844) obviously refers to all creditors, whether natural or artificial persons. Sec. 3840, Stats. 1898, provides for an order fixing the time "within which creditors shall present their claims," and sec. 3844, Stats. 1898, provides that every person having a claim who shall not, after notice given, exhibit it within the time limited shall be forever barred. These statutes clearly refer to creditors, and require all creditors of the deceased, except those specifically mentioned in sec. 3860, Stats. 1898, to exhibit their claims for examination and allowance within the time limited by the order of the court or be forever barred. This is the policy and purpose of such statutes. *Ernst v. Nau,* 63 Wis. 134, 23 N. W. 492; *Winter v. Winter,* 101 Wis. 494, 77 N. W. 883. We think, therefore, that the estate of Cath-

erine Minaghan was a creditor and person having a claim within the meaning of these statutes. *Rains v. Oshkosh,* 14 Wis. 403; *Segnitz v. Garden City B. & T. Co.* 107 Wis. 171, 83 N. W. 327; 2 Rapalje & L. Law Dict. 945; *Billings v. State,* 107 Ind. 54, 6 N. E. 914, 7 N. E. 763; *Winter v. Winter, supra; Ernst v. Nau, supra;* 2 Woerner, Adm'n (2d ed.) § 402.

The filing of the claim of John J. Minaghan by his guardian against the estate of John Minaghan, deceased, cannot inure to the benefit of the respondent here. It was a different cause of action and prosecuted in a different right. *McKenney v. Minahan,* 119 Wis. 651, 97 N. W. 489. We know of no rule of law that will permit the respondent to avail herself of the proceedings there to support her claim here. We have examined the authorities cited by counsel on this point, and fail to discover that they support his contention. In *McKenney v. Minahan, supra,* the infant sued through his guardian to recover for his own benefit, and in the instant case the respondent sues to recover for the benefit of Catherine Minaghan's estate. The fact that eventually the infant who is heir of Catherine Minaghan, deceased, may profit by the recovery here cannot change the situation. The question discussed by respondent's counsel to the effect that statutes of limitation will not run against the wife in an action against the husband need not be further treated, because, independent of the fact that the present action is not between husband and wife, we have shown that the defense of coverture does not apply at all under this "nonclaim" or special statute, where there is no specific exemption in the statute itself. *Winter v. Winter,* 101 Wis. 494, 77 N. W. 883; 2 Woerner, Adm'n (2d ed.) § 402. It is further claimed that there was fraud on the part of the representatives of the defendant estate, from the consequences of which this court should grant relief. It appears from the record that the court below refused to find that any fraud had been committed. There is nothing

in the record which would entitle the respondent to relief on the grounds of fraud.

Counsel for respondent has shown great labor and research in the examination and presentation of authorities, and we have examined with care his very lengthy brief, but cannot bring ourselves to the conclusion that the judgment of the court below is right. We have not deemed it necessary to treat all the points made by counsel in his brief, but may say in passing that all questions discussed have received careful consideration. We think the claim presented was barred, and that the judgment below must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with instructions to affirm the judgment of the county court.

ABRAMS, Guardian, Respondent, vs. UNITED STATES FIDELITY & GUARANTY COMPANY, imp., Appellant.

February 26—March 20, 1906.

Guardian and ward: Collection and disposition of ward's funds: Employment of attorney: Interest, from what date computed: Discretion: Trial: Stipulation as to evidence: Lodging and personal service by guardian to ward: Accounting: Annual rests: Appeal: Prejudicial error: Costs.

1. It is the duty of a guardian, as trustee of the funds of his ward, on receiving such funds, to keep them for his ward, and to invest so much of them as is not required for immediate and necessary use as soon as he can do so with reasonable diligence.
2. In performing such duty he can employ an attorney to collect the ward's funds, but when the guardian has received them the functions of the attorney are ended, and if the guardian then places the funds in the attorney's hands to invest, the attorney becomes simply an agent to whom the guardian has delegated his duties as trustee.
3. Where a guardian employed an attorney to collect his ward's es-

tate, and the amounts so collected were represented by checks or drafts payable to the guardian, which the guardian indorsed and handed back to the attorney for investment, and the attorney afterwards defaulted, on an accounting the guardian is properly charged with such amounts.

4. In such case when the drafts came to the guardian's hands he came into the possession of so much of his ward's estate, and his personal duty to manage that part of the ward's estate then began.
5. The question as to the time from which a guardian shall be charged with interest on the funds of his ward, lost through the negligence of the guardian, is a matter resting in the sound discretion of the trial court in view of all the facts.
6. Where a guardian had neglected his duty as to his ward's funds and made no attempt to invest them, it is no abuse of discretion to charge the guardian with interest thereon, commencing two months from the receipt of part of the funds and three months upon the balance.
7. Where no application is made to the trial court to be relieved from a stipulation that a guardian received a sum of money belonging to his ward at an agreed date, and that no testimony should be received in conflict with the stipulation, it must be held to control on appeal.
8. Where a guardian voluntarily stood *in loco parentis* to his wards and never intended to charge them anything for lodging or personal services, on an accounting neither the guardian nor his surety has any right to credit therefor.
9. In an accounting by a guardian annual rests should be made, the amounts expended for the preceding year deducted, and interest computed on the balance up to the next annual rest; but where the method adopted was more favorable to the guardian—in allowing him interest on his disbursements from a period midway between the time of his appointment and the time of his resignation,—it is not prejudicial error on the guardian's appeal.
10. In an action by a successor guardian to compel the former guardian to account, it is not error to allow costs against a surety who appeared in and defended the action.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is a proceeding to settle the final account of Sarah Perry as the guardian of the estate of certain minors. The appellant was a surety upon the guardian's bond, and was

made a party to the proceedings in the county court, and appealed from the order of that court settling the guardian's account to the circuit court, where the matter was again tried and the account settled, and from that judgment the surety appeals to this court. There was little substantial dispute as to the facts. It appeared that Herbert D. Avery and his wife, Ida, resided in Colorado, where Ida died December 4, 1899, leaving four small children, Bessie, Perry, Alois, and Marie, the minors in question, and about December 20, 1899, Sarah Perry, a sister of the deceased, went to Colorado and brought the children to her home in Winnebago county, in this state, to live with her, under an arrangement with the father that the father was to pay what he could for their keeping; that the father afterwards sent on various sums for this purpose, amounting to $330 in all; that the father was killed in a railroad accident on the Colorado & Southern Railway October 18, 1900, leaving the four children as his only heirs at law; that Sarah Perry was appointed guardian of the persons and estate of the minors by the county court of Winnebago county December 4, 1900, and gave a guardian's bond in the sum of $8,000, with the appellant as surety; that the guardian at once employed one Herbert L. Sweet, then an attorney of good standing in Oshkosh, as her attorney; that at the time of Avery's death he had two policies of life insurance, one in the Independent Order of Foresters, of $3,000, and one in the Ancient Order of United Workmen, of $2,000, both being in favor of his heirs; that he also left some property in Colorado, which was afterwards administered upon, the net amount realized being $482.98; that there was also an unsettled claim against the railroad company for the death of said Herbert; that the mother, Ida, left forty acres of land in Winnebago county, title to which passed to the minors; that Miss Perry, as guardian, put the various claims into Sweet's hands for collection, and that under authority from the county court of Winnebago county a settle-

ment was arranged by Sweet with the railroad company of the death claim on the basis of the payment of $1,250. Miss Perry, as guardian, signed a receipt and release for this claim, and Sweet sent the same to the railroad company, and a check for $1,250 was returned to Sweet. There was no direct evidence as to whether this check was payable to the guardian or to Sweet. The court found, however, that it was payable to Miss Perry and was indorsed by her and turned over to Sweet. The claim against the Independent Order of Foresters was also collected by Sweet, the draft being sent to him, payable to the order of Miss Perry, who indorsed the draft and signed the receipt and returned both draft and receipt to Sweet. The guardian testified, and the court found, that she left these drafts in the hands of Mr. Sweet for investment, and that the same course was pursued with the sum of $482.98 collected from the administration of Avery's estate in Colorado. It appeared without dispute that Sweet immediately deposited the drafts in each case to his own credit in the bank. The sum of $2,000 from the Ancient Order of United Workmen was paid to Miss Perry in cash, and she kept $1,000 thereof, and took the other $1,000 to Sweet and left it with him to invest. Sweet returned to Miss Perry $200 out of the $1,250 received from the railroad company, but did not return any other sums. He claimed that he had invested the money in real-estate mortgages, and to deceive Miss Perry made some payments to her of sums which he claimed to have received as interest on the investment, but he never turned over to her any securities, and in fact used the moneys himself as soon as he received them, and left the city in the spring or summer of 1902, leaving many thousand dollars of liabilities, including his liability to the guardian. Miss Perry made no effort at any time by suit to obtain the moneys or the securities from Sweet. She made no charge at any time against the infants for care, lodging, or food, but kept accurate account of the moneys expended for clothing, school

books, and other incidentals. She testified that she never intended to charge them for care or lodging, and the court found that she stood in the relation of parent to them. In the account, as settled by the circuit court, the guardian was charged with the sums received from the insurance companies, the railroad company, and from the estate in Colorado, with interest on such sums at six per cent., commencing two months from the receipt thereof upon part of the sums, and three months upon the remainder. She was also charged with the payments made to her by Sweet as interest, and with $108 received from the forty-acre farm as rent. She was credited with the sums which she paid for taxes and repairs upon the real estate, also with the sums paid for clothing and incidentals paid for the minors, and with the premiums paid for her bond. She was allowed $50 as a reasonable amount for legal services, and $1,450 for food furnished to the minors from December 20, 1899, to February 20, 1904, less $330 received from the father. She resigned as guardian of the estate of the minors February 20, 1904, and the respondent *Abrams* was appointed to that trust, and this accounting was thereafter had.

For the appellant there was a brief by *Thompson, Thompson & Pinkerton,* and oral argument by *J. C. Thompson.*

Carl D. Jackson, for the respondent.

WINSLOW, J. The guardian was a trustee of the funds of her wards. It was her duty, on receiving such funds, to keep them for her wards, and to invest so much of them as was not required for immediate and necessary use, as soon as she could do so with reasonable diligence. She could employ an attorney to collect them, and, if she exercised reasonable care and prudence in the choice of an attorney, doubtless she would be protected from losses occurring by the fraud or negligence of the attorney in the course of his duty as collecting agent; but when she had received the funds by draft or in cash

the functions of the attorney for collection ended, and if she then placed the fund in his hands to invest he became simply an agent to whom she had attempted to delegate her duties as trustee. Mr. Lewin, in his work on Trusts (vol. 1, p. 252), says:

"Trustees who take on themselves the management of property for the benefit of others have no right to shift their duty on other persons; and if they do so they remain subject to the responsibility towards their *cestuis que trustent* for whom they have undertaken the duty. If a trustee, therefore, confide the application of the trust fund to the care of another, whether a stranger, or his own attorney or solicitor, or even co-trustee or co-executor, he will be held personally responsible for any loss that may result."

This principle is firmly established. It does not mean that a trustee may not employ a broker or attorney to do those things which in the ordinary course of business such agents would be employed to do, but simply that he cannot delegate to others the doing of those things which he is in duty bound to do himself. The collection of claims against others involving actions at law or negotiations for settlement may well be intrusted to an attorney. The guardian has not undertaken to act as an attorney, but the care and investment of the funds which reach his hands is one of the very things which the guardian has agreed to attend to, and if he delegates this duty to another, whether he be an attorney or a layman, he makes such other his personal agent and is responsible for his acts. A guardian's duty, by the terms of his appointment, is "to dispose of and manage" his ward's estate according to law, and such is the tenor of his bond. He may employ attorneys or agents according to the usual course of business to reduce the estate to possession and to protect it, but when once in his hands his personal duty to dispose of and manage it begins, and this duty is not to be delegated.

These considerations really dispose of the most serious question raised by the appellant in this case, namely, the

question whether the guardian should be charged with the sums received from the railroad company, the Order of Foresters, and the administrator of Avery's estate in Colorado. The claim is that these sums never, in fact, came to the hands of the guardian, but were squandered by the attorney in the process of collection. The court found, upon sufficient evidence, that these amounts were represented by bank drafts or checks payable to the order of the guardian, which came to the guardian through the attorney, and that the guardian indorsed them and handed them back to the attorney, to be invested by him for her as guardian. It must be held that, when the draft came to her hands, she came into possession of so much of her ward's estate. Her personal duty to manage that estate then began. It is claimed that interest should not have been charged upon the funds which came to the guardian's hands prior to the expiration of six months from the time of their receipt. This is a matter resting in the sound discretion of the trial court in view of all the facts. The court allowed about two months upon a part of the funds, and three months upon the balance, during which time no interest was charged. The fact being that the guardian absolutely neglected her duties and made no attempt to invest the funds, we cannot say that there was any abuse of discretion. *In re Thurston*, 57 Wis. 104, 15 N. W. 126. Interest was charged on the sum of $482.98, received from the estate of Herbert D. Avery, from April 1, 1901, and it is claimed that the testimony shows that this amount was not actually received until November, 1901. There was certainly testimony to this effect, but by the stipulation of facts in the case it was expressly stipulated that the sum was received about February 1, 1901, and that no testimony should be received in conflict with the stipulation. As no application was made to the trial court by the appellant to be relieved from the stipulation, it must be held to control.

It is contended that the court should have allowed the

guardian a reasonable sum for lodging of the children and for her personal services in their care. The fact was that she voluntarily stood *in loco parentis* to these children and never intended to charge them anything for lodging or services. Under these circumstances neither the guardian nor the surety has any right to such credit. *Hudson v. Jenson,* 110 Wis. 26, 85 N. W. 689. The court allowed the guardian interest on her disbursements at six per cent. per annum from a period midway between the time of her appointment and the time of her resignation. This was not the proper plan of accounting. Annual rests should have been made, and the amounts expended for the preceding year deducted, and interest computed on the balance up to the next annual rest; but, as the result of the method adopted by the court is more favorable to the appellant, there was no prejudicial error. *In re Thurston, supra.* The allowance of costs in the circuit court is complained of, but no reason is perceived why such action was not strictly right.

By the Court.—Judgment affirmed.

MARTIN, Appellant, vs. FOND DU LAC COUNTY, Respondent.

February 26—March 20, 1906.

Paupers: Contagious diseases: Liability of county: Statutes: "Proper board of health."

1. Plaintiff being possessed of a boarding house and business, one of her patrons was taken sick with smallpox, and herself, family, and other boarders quarantined by the city authorities. Shortly thereafter the city authorities refused to further care for the patient, and turned the matter over to the duly authorized poor agent of the defendant county, who continued the quarantine. Plaintiff brought this action for the value of her property used up or rendered worthless, the value of the use of her premises and belongings, injury to her health and that of her daughter,

and the value of services rendered in taking care of the sick. *Held:*

(1) Principles of natural justice, of themselves, are insufficient to create such a liability against the county.

(2) There is no common-law liability of counties to care for the poor, or to conserve the public welfare by preventing the spread of contagious or other diseases, or caring for those affected therewith.

(3) Counties have no power whatever except such as is derived from the written law.

(4) There is no statute imposing the duty on counties, primarily or otherwise, to take charge of and care for persons because of their being afflicted with contagious diseases.

(5) No cause of action existed in favor of plaintiff.

2. Under sec. 1416, Stats. 1898 (providing that, when any person shall be infected with smallpox, the proper board of health may immediately cause him to be removed to a separate house, if that can be done without danger to his health, and otherwise shall make provision for him in the house where he may be, and take such other measures as they may deem necessary for the safety of the inhabitants, and in either case they shall provide for him nurses and necessaries), there is no other public liability than that of the particular municipality where the necessity arises for action in caring for persons so affected with a contagious disease.

3. The term "proper board of health" as used in sec. 1416, Stats. 1898, plainly restricts the liability to the particular municipality where the person suffering from a contagious disease is located, since there is no statute providing for county boards of health.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action to recover a sum of money from the defendant county. The facts involved are in brief these: Plaintiff being possessed of a boarding house and business in the city of Fond du Lac in such county, one of her patrons was taken sick with smallpox, and her premises were thereupon quarantined by the city authorities, all the boarders and plaintiff's family being confined thereto for a considerable period of time. Then by reason of the fact, as supposed, that the sick person was not a resident of the county, the city refused to further care for him and turned the matter over to the duly

authorized poor agent of such county, who assumed jurisdiction of the matter pursuant to a notice under the poor law. Under the direction of such agent plaintiff's premises, together with all of her belongings therein, were used as before for several weeks. She did not consent at any time to such appropriation of her property. She endeavored to have the sick person removed therefrom and cared for elsewhere, though the manner in which he was taken care of was the only practicable one under the circumstances. By reason of the premises plaintiff's house and furnishings were used for the public benefit; she was prevented from enjoying the emoluments of her boarding-house business, and together with her daughter was required to and did, under the direction of the physician in charge, perform valuable services in taking care of the sick. A detailed statement of her property which was used up or rendered worthless by reason of the facts stated, and the value thereof, and of the value of the use of her premises and belongings, and the injury to her business and to her health and that of her daughter, and the value of the services rendered in taking care of the sick, amounting to $4,004.50, duly verified, was presented to the board of supervisors of the county for allowance in June, 1903. It was disallowed and an appeal was duly taken to the circuit court.

Defendant answered, pleading a former judgment in bar and admitting the filing of the claim as alleged, and disallowance thereof, but alleging that the disallowance occurred by reason of the same claim having been previously presented, considered, and acted upon adversely.

When the cause was reached for trial an objection to any evidence under the complaint was sustained, and thereupon the cause was dismissed, and judgment was rendered accordingly.

For the appellant the cause was submitted on the brief of *E. Blewett.*

E. P. Worthing, for the respondent.

MARSHALL, J. As we understand it, counsel for appellant grounds the validity of her claim on principles of natural justice. Those principles are very broad, but of themselves are hardly sufficient to create a liability against a county. There can be no such liability of a contractual nature other than such as is expressly authorized by statute, and incurred in the manner provided therein, or by an ostensible, though void, transaction happening in good faith as to the municipal officers, or agents, and private party participating therein, whereby the money of the latter is acquired and actually used for legitimate purposes of the former, as in *Thompson v. Elton,* 109 Wis. 589, 85 N. W. 425, and *Rice v. Ashland Co.* 114 Wis. 130, 89 N. W. 908, and similar cases. Manifestly they do not apply, even remotely, to the facts here, unless the county was obligated by law, or had authority, to perform the service rendered in taking care of the sick person, supposed to have given rise to the plaintiff's claim.

There is no common-law liability of counties to care for the poor, or to conserve the public welfare by preventing the spread of contagious or other diseases, or caring for those afflicted therewith. Counties have no power whatever, as indicated, except as derived from the written law. *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798. There is no statute imposing the duty on counties primarily or otherwise to take charge of and care for persons because of their being afflicted with smallpox. The statute (sec. 1416, Stats. 1898) clearly imposes that duty on the particular subdivision of the county wherein the necessity arises, whether in the particular instance the person is a resident thereof or is a pauper or a stranger.

Counsel for appellant places some reliance on the secondary, in some cases, and in others primary, liability of counties to care for nonresident paupers under sec. 1512 of the Statutes. Respondent's poor agent, it seems, supposed such statute governed, in taking charge of the matter upon notice be-

ing served. Manifestly, however, the case does not in any aspect fall therein. The situation was in all respects such as is expressly provided for by said sec. 1416. The material part is this: "When any person . . . shall be infected . . . with the smallpox . . . the proper board of health may immediately cause him to be removed to a separate house, if it can be done without danger to his health," and otherwise "shall make provision for him in the house where he may be; and . . . take such other measures as they may deem necessary for the safety of the inhabitants; and in either case they shall provide for him nurses and necessaries," etc. There is not a suggestion therein of any other public liability than that of the particular municipality where the necessity arises for action in the matter. The term "proper board of health" plainly restricts the liability as stated because there is no statute providing for county boards of health. That is conclusive of this appeal.

By the Court.—The judgment is affirmed.

WESCOTT, County Judge, Appellant, vs. UPHAM, imp., Respondent.

February 27—March 20, 1906.

Guardian and ward: Discharge of guardian by majority of ward: Limitation of actions: Liability of sureties on guardian's bond: Statutes: Construction: "Under any legal disability to sue:" Appeal from county court: Stay of proceedings.

1. Under sec. 3968, Stats. 1898 (providing, among other things, that no action shall be maintained against the sureties on any bond given by a guardian unless commenced within four years from the time when the guardian shall have been discharged), the guardian is discharged, within the meaning of the statute, when the ward attains his majority, and the fact that the same person

is also guardian of other minors, although appointed such by the same order, and the performance of his duties secured by the same bond, is no obstacle to such discharge.

2. Sec. 3968, Stats. 1898, is peculiar in that it adopts, as a date for the commencement of the limitation period, the discharge of the guardian and fixes an arbitrary term of four years thereafter; and hence, while it may be a preliminary to any right to sue on a guardian's bond that an accounting must be had in the county court and the breach of the bond established, such full accrual of the cause of action is not necessary before the limitation commences to run.

3. Whether, in view of the possibility that a hearing upon a guardian's account may be protracted, against the control of the minor, to or beyond the period of the limitation provided in sec. 3968, Stats. 1898, there ought to be some exception made so as to assure adequate opportunity to sue thereafter, is a question for the legislature, but in its absence it cannot be construed into the statute by the court.

4. The provisions of sec. 3968, Stats. 1898 (requiring actions against sureties on a guardian's bond to be commenced within four years from the time when the guardian shall have been discharged), apply to bonds given under sec. 4004, on sale of the ward's real estate, since the words of sec. 3968, "on any bond given by a guardian," are too plain to permit of construction other than according to their literal effect.

5. Where the operation of sec. 3968, Stats. 1898, allowed a ward only thirty-four days after the termination of the accounting proceedings in which to bring actions against the sureties on the guardian's bond, no question of the reasonableness of the statute is presented by a record showing that the ward had allowed substantially one half of the statutory four years to elapse before instituting the proceedings for the settlement of the guardian's account.

6. Under sec. 3968, Stats. 1898 (providing that no action shall be maintained against the sureties on any bond given by a guardian unless it be commenced within four years from the time when the guardian shall have been discharged; and that if, at the time of such discharge, the person entitled to bring such action shall be *under any legal disability to sue*, the action may be commenced at any time within four years after such disability shall be removed), the want of legal capacity to sue refers to some characteristic of the person disqualifying him in some degree from acting freely for the protection of his rights, not to an impediment to the maintenance of the particular cause of action.

7. Under sec. 3968, Stats. 1898, the settlement of a guardian's accounts before action against the sureties is not a disability attributable to any personal peculiarity of the ward; it is an obstacle to the maintenance of the action applicable to all persons alike, and does not extend to mere incompleteness of the cause of action.

8. Under the provisions of sec. 4036, Stats. 1898 (that upon appeal from the county court "all further proceedings in pursuance of the act appealed from shall cease"), an appeal to the circuit court from an order of the county court settling the account of a guardian and fixing the amount due the ward does not serve to stay the institution of suit in the circuit court on the bond, but merely further proceedings in the county court in pursuance of the order appealed from.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The defendant Semple, being general guardian of Louise Semple and Anna Semple, minors, in 1892 obtained license to sell certain real estate belonging to his wards in common, and gave a joint and several bond, with George W. Gibbs and *Charles M. Upham* as sureties, in compliance with sec. 4004, Stats. 1898, whereupon sale was made. Louise Semple, now Zoerb, became of age February 8, 1895; Anna Semple, not until after September 14, 1895. On January 8, 1897, Louise Semple petitioned the county court for an accounting by the guardian, whereupon said guardian stated an account as to both wards, upon which a hearing was had settling said guardian's account, from which he appealed to the circuit court, where it was heard at the December, 1897, term, and judgment entered January 4, 1899, settling said account and adjudging $24,715 due, which included $4,568.53 as the proceeds of the lands sold, with interest to the date of said settlement; the court finding that said guardian never invested any of such proceeds, but kept the same for his own personal use. On September 12, 1899, an order was entered by the county court permitting Louise Zoerb and Anna Semple to sue upon the bond in question, and this action was commenced September 14th on behalf of the two wards jointly against Semple,

the guardian, and *Charles M. Upham,* the other surety being dead. *Upham* interposed answer setting up the fact that more than four years had elapsed intermediate Louise Zoerb's majority and the commencement of the action, and claiming bar of any action by or for her by force of sec. 3968, Stats. 1898. The court found a breach of the bond with the amount of the liability thereon and entered judgment in favor of Anna Semple, but dismissed the complaint as to Louise Zoerb, on the ground that her action was barred by the statute of limitations. From that judgment Louise Zoerb appeals.

For the appellant there was a brief by *Sloan & Cannon,* and oral argument by *H. C. Sloan.*

For the respondent there was a brief by *M. J. Wallrich,* attorney, and *Wallrich, Dillett & Larson,* of counsel, and oral argument by *C. F. Dillett.*

DODGE, J. The sole question presented is whether this action, not commenced until more than four years after plaintiff reached her majority, is barred by the provisions of sec. 3968, Stats. 1898, providing:

"No action shall be maintained against the sureties on any bond given by a guardian unless it be commenced within four years from the time when the guardian shall have been discharged."

The guardian is discharged, within the meaning of this statute, when the ward attains his majority. *Paine v. Jones,* 93 Wis. 70, 67 N. W. 31. The fact that the same person is also guardian of other minors, although appointed such by the same order and the performance of his duties secured by the same bond, is no obstacle to this conclusion. Obviously, when a minor attains his majority, his former guardian is no longer such. *Probate Judge v. Stevenson,* 55 Mich. 320, 21 N. W. 348.

Numerous grounds are urged to avert the bar resulting from the express words of this statute. For example, it is as-

serted that, as a preliminary to any right to sue on the bond, an accounting must be held in the county court and the breach of the bond established; hence it is argued that no cause of action accrues prior to such settlement, and there are cited to us many cases applicable to other statutes of limitation insisting upon full accrual of the cause of action before they commence to run. But these decisions are all under statutes which bar the action in a certain time after the cause of action accrues. The statute before us is peculiar in that it adopts, as a date for the commencement of the limitation period, the discharge of the guardian and fixes an arbitrary term of four years thereafter, so that authorities of this class are not applicable. Whether, in view of the possibility that a hearing upon the guardian's account essential to the establishment of complete cause of action on his bond may be protracted, against the control of the minor, to or beyond the period of that limitation, there ought not to be some exception made so as to assure adequate opportunity to sue thereafter, is a question for the legislature, and unless such exception can be found in the statute it cannot be imported by the court.

It is urged that sec. 3968, Stats. 1898, being in the chapter (170) regulating the general conduct of the guardianship, and in which there is provision only for the giving of the general guardian's bond, has no application to the bond in suit, which was given in a special real-estate sale proceeding under the ensuing ch. 171, Stats. 1898. This position is untenable, for the statute by its terms limits action "on any bond given by a guardian." These words are too plain to permit construction other than according to their literal effect.

It is argued that the limitation as applied in this case would be so unreasonable as to be unconstitutional, for that it allowed the plaintiff only thirty-four days after the termination of the accounting proceedings in which to bring her suit. We shall not deem it necessary to decide whether a limitation of thirty-four days after opportunity to sue arose could

be held unconstitutional as applied to a contract and right of action arising after the statute went into effect. No such question is presented here, for the statute allowed four years, of which substantially one half was allowed by plaintiff to elapse before instituting proceedings for the settlement of the guardian's account.

One of the most earnest, and perhaps plausible, of appellant's contentions is that during the period of accounting and until the settlement of the guardian's account plaintiff was, within the words of the statute, "under (any) legal disability to sue;" so that she had four years after the termination of that accounting in which to bring her action. Conceding, without deciding, that she was unable to sue during that period, was it a "disability to sue" within the meaning of the section? That phrase is one of somewhat frequent occurrence in the Statutes, and has attained generally, if not universally, the meaning of a personal disability to maintain suit, as distinguished from a mere obstacle to the commencement of a particular action. Thus we find general statutes of limitation (ch. 177, Stats. 1898) making allowance to "persons under disability" in sec. 4233; but, obviously, that is not intended to apply to such lack of opportunity to sue as presented in this case, for by other sections such a mere lack of opportunity is provided for. Thus, inability to sue by reason of incompleteness or nonaccrual of the cause of action is provided for by sec. 4249, Stats. 1898; inability by reason of injunctional or statutory prohibition is provided for by sec. 4236, Stats. 1898; inability by reason of the absence of the defendant from the state is protected by sec. 4231, Stats. 1898. The same expression, "under legal disability to sue," is also found in sec. 3918, Stats. 1898, where it is so coupled with minority as to fully indicate a legislative understanding that it is used in the sense of a disability similar to minority. We deem it clear that want of legal capacity to sue, as used in this and other statutes of limitation, refers to some

characteristic of the person disqualifying him in some degree from acting freely for the protection of his rights, not to an impediment to the suability of the particular cause of action. 5 Words & Phrases, 4060; *Berkin v. Marsh,* 18 Mont. 152, 44 Pac. 528; *Meeks v. Vassault,* 3 Sawy. 206, Fed. Cas. No. 9,393; *Wiesner v. Zaun,* 39 Wis. 188; *McKenney v. Minahan,* 119 Wis. 651, 656, 97 N. W. 489. Obviously, necessity for settlement of a guardian's accounts before action against the sureties is not a disability attributable to any personal peculiarity of plaintiff; it is an obstacle to the maintenance of the action applicable to all persons alike. We are satisfied that we should do violence to the entirely well-established meaning of the statutory phrase used should we extend it to mere incompleteness of the cause of action.

Contention is made that by sec. 4036, Stats. 1898, providing that upon appeal from the county court "all further proceedings in pursuance of the act appealed from shall cease," etc., the bringing of the present action was stayed by statutory prohibition pending such appeal, so that such time should be deducted by virtue of sec. 4236, Stats. 1898. The premise is, however, contradicted by *Richter v. Leiby,* 99 Wis. 512, 75 N. W. 82. The appeal from the order of county court did not serve to stay the institution of suit in circuit court on the bond, but merely further proceedings in the county court in pursuance of the order appealed.

Thus we are unable to find any fact to exempt either this action or this plaintiff from the peremptory inhibition of the statute quoted, and must approve the decision of the trial court denying any recovery in favor of the appellant against the surety.

By the Court.—Judgment affirmed.

KRONSHAGE and others, Executors, Appellants, vs. VARRELL and others, Respondents.

February 27—March 20, 1906.

Wills: Actions for construction: Costs: Attorney's fee: Allowance to beneficiaries: Statutes: Construction.

1. In an action brought for the construction of a will the court has no authority to make an allowance out of the estate for fees of the attorney of the beneficiaries under the will in addition to taxable costs.
2. An action to construe a will is not a contest arising upon an application for the probate of a will, and the allowance authorized by ch. 397, Laws of 1901 (providing that any court of record, in contests arising therein, upon application for the probate of any will, in its discretion may allow to the proponent of such will a reasonable attorney's fee, to be paid out of the estate of the decedent, and may also, in its discretion, allow to the contestant, if successful in the circuit court, a reasonable attorney's fee, out of said estate, for services in such contest in said circuit court), is strictly limited to "contests arising therein, upon application for the probate of any will."

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

For the appellants the cause was submitted on the brief of *Howe & Gilman.*

For the respondents there were briefs by *Fethers, Jeffris & Mouat* for respondents *Eunice B. Varrell* and *Minnie Wheeler;* and by *Ed. M. Lowry, Bushnell, Watkins & Moses,* and *J. J. Blaine* for the respondents *Blanche McLimans, James Varrell,* and *William Varrell,* and oral argument by *M. G. Jeffris.*

KERWIN, J. An action was brought for construction of a paragraph of the will of John W. Varrell, deceased, and was before this court on former appeal (*Kronshage v. Varrell,* 120 Wis. 161, 97 N. W. 928), the judgment of the court below reversed and judgment entered decreeing the will valid. At the time of the entry of judgment below the respondents

applied for allowance out of the estate for attorney fees in addition to taxable costs, fees, and disbursements. Appellants, the executors, opposed any allowance to the respondents. Upon hearing of the motion the court allowed the respondents *Eunice B. Varrell* and *Minnie Wheeler* the sum of $850, costs, disbursements, and attorney fees, and *Blanche McLimans, James Varrell,* and *William Varrell* the sum of $850, costs, disbursements, and attorney fees to be paid out of the estate. From that part of the judgment allowing said sums to respondents this appeal was taken.

The only question involved here is whether the court had authority to make an allowance to respondents out of the estate in addition to the taxable costs. It is settled that the court has no such authority. *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786; *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *Stephenson v. Norris,* 128 Wis. 242, 107 N. W. 343. It is claimed, however, by appellants that ch. 397, Laws of 1901, justifies the judgment of the court below and authorizes the allowance. It is very clear that ch. 397, Laws of 1901, applies only to contests arising upon application for the probate of a will. It provides:

"Any court of record, in contests arising therein, upon application for the probate of any will, in its discretion, may allow to the proponent of such will a reasonable attorney's fee, to be paid out of the estate of the decedent, and may also, in its discretion, allow to the contestant, if successful in the circuit court, a reasonable attorney's fee out of said estate for services in such contest in said circuit court."

An action to construe a will is clearly not such a contest. The allowance authorized by this act is strictly limited to "contests arising therein, upon application for the probate of any will." The legislative intention seems plain, and we cannot disregard it. It follows that the court below had no authority to make the allowance, and that the judgment, therefore, must be reversed.

By the Court.—The judgment of the court below is reversed.

THE STATE EX REL. DOSCH, Respondent, vs. RYAN and others, Appellants.

February 27—March 20, 1906.

Highways: Establishment: Proceedings: Promises of private aid in construction: Public policy.

1. Highways are only to be laid out when the public good will thereby be promoted, and private considerations or inducements cannot rightly enter into the question in any degree.
2. Bargains with public officers who are exercising the important and sovereign power of laying out highways, and the offer of inducements of any kind tending to influence their free action, are not only void as against public policy, but official action based thereon ceases to be based solely upon the public welfare and becomes tainted with some degree of private interest.
3. In proceedings before commissioners appointed by the county judge to review the decision of the town supervisors denying an application to lay out a highway, the commissioners met, and two were in favor of laying out the highway and one opposed. D., a person interested in the establishment of the highway, having been called in and asked if he would grade the piece of new road and build a bridge at his own expense, agreed to do so, and gave a bond to the commissioners binding himself to do such acts, conditioned that if he failed to do so the road should not be laid out or opened. Thereupon the commissioners unanimously decided to lay out the highway as prayed, and filed their written decision to that effect, accompanied by the bond. *Held:*

   (1) The decision of the commissioners was conclusively shown to have been, in part, based upon the fact that the bond had been given, and was void.

   (2) It did not avail the validity of the proceeding that a majority of the commissioners testified that they would have decided to lay out the highway had the bond not been given.
4. In such situation there is safety only in the entire prohibition of such transactions.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Richmond & Lincoln,* and oral argument by *P. L. Lincoln* and *S. T. Swansen.*

They contended, *inter alia,* that, when the sovereign authority decides to take private property for public use, the primary finding that "the public good will thereby be promoted" must not be induced or promoted by private considerations; if so, it is fatal to the determination. *State v. Castle,* 44 Wis. 670; *State ex rel. Curtis v. Geneva,* 107 Wis. 1; *Shelby v. Miller,* 114 Wis. 660; *Dudley v. Cilley,* 5 N. H. 558; *Knowles' Petition,* 22 N. H. 361; *Smith v. Conway,* 17 N. H. 586; *McGuire v. Smock,* 42 Ind. 1, 13 Am. Rep. 353; *Howard v. First Ind. Church,* 18 Md. 451; *Comm. v. Sawin,* 2 Pick. 547; *Webb v. Albertson,* 4 Barb. 51; *Hoadley v. Waterbury,* 34 Conn. 38; *Comm. v. Cambridge,* 7 Mass. 158; *Hampton v. Poland,* 50 N. J. Law, 367, 13 Atl. 174. The distinction is clear between donations which are purely voluntary and payments of money which *tend to or have for their object* the swerving of a *quasi*-judicial decision. *Jones v. Andover,* 9 Pick. 146. *Comm'rs of Canal Fund v. Perry,* 5 Ohio, 56, 58, and *State v. Collins,* 6 Ohio, 126, cited in *State ex rel. Curtis v. Geneva,* 107 Wis. 8, as sustaining such a contract, are clearly distinguishable. The order and bond being signed, they together constitute contemporaneous instruments. In law they constitute the final decision and determination of the commissioners. *Winner v. Hoyt,* 66 Wis. 227, 234; 17 Am. & Eng. Ency. of Law (2d ed.) 9; 26 Am. & Eng. Ency. of Law (2d ed.) 623; 1 Greenl. Ev. § 283.

F. W. Burnham, for the respondent.

WINSLOW, J. This is an action of *mandamus* brought by the relator to compel the defendants, as town supervisors, to alter a certain highway in accordance with the determination of commissioners. It appeared upon the trial that in February, 1903, the relator with other freeholders applied to the defendants, as supervisors, to alter a certain highway in the town by laying a piece of new road and discontinuing a portion of the old highway, under sec. 1265, Stats. 1898, and

that on March 14th following the supervisors denied the application; that thereafter an appeal was taken from such denial, and commissioners were appointed by the county judge to review the decision of the supervisors, under secs. 1276–1279, Stats. 1898; that the commissioners met, and two of their number were in favor of making the alteration, but one was opposed thereto; that *Dosch,* the relator, was then sent for and asked if he would be willing to grade the piece of new road and build a necessary bridge thereon at his own expense, and he agreed that he would do so; that *Dosch* thereupon executed and gave to the commissioners his bond in the sum of $1,000 running to the town, binding himself to build the road and the bridge on or before November 1, 1904, and further conditioned that if he failed to do so then such road should not be laid or opened; that thereupon the commissioners unanimously decided to alter the road as prayed, and filed their written decision to that effect, accompanied by the bond. The trial court found that the majority of the commissioners were not influenced in their action by the agreement and bond made by *Dosch,* and that the decision was in all respects valid, and awarded the peremptory writ of *mandamus.*

We find ourselves unable to agree with the conclusions reached by the trial judge. Highways are only to be laid out when the public good will thereby be promoted. Private considerations or inducements cannot rightly enter into the question in any degree. If private individuals with special interests were allowed to bargain with public officers who are exercising this important and sovereign power, and to offer inducements of any kind tending to influence their free action, the interests of the public would be at once in jeopardy. Not only are such bargains void as against public policy, but official action based thereon ceases to be based solely upon the public welfare, and becomes tainted with some degree of private interest.

To approve of such a course would be to open the door to

injustice and favoritism. *State ex rel. Curtis v. Geneva,* 107 Wis. 1, 82 N. W. 550; *Shelby v. Miller,* 114 Wis. 660, 91 N. W. 86. It avails not to say that the majority of the commissioners testify that they would have decided to lay the road had the bond not been given. They did not do so. No decision was made until after the bond was given. The decision is conclusively shown to have been, in part, based upon the fact that the bond had been given. No nice separation of motives is possible. There is safety only in the entire prohibition of such transactions.

By the Court.—Judgment reversed, and action remanded with directions to quash the writ.

IN RE GERTSEN'S WILL: GERTSEN, Administratrix, Appellant, vs. CLEMENTSON, Guardian *ad litem,* Respondent.

February 27—March 20, 1906.

Foreign wills: Probate in Wisconsin: Jurisdiction: Procedure: Statutes: Construction: Counsel fees: County courts: Circuit courts.

1. Under sec. 3790, Stats. 1898 (providing, as to the probate in Wisconsin of wills theretofore admitted to probate in other states and countries, that if on the hearing it shall appear to the court that the order or decree admitting such will to probate was made by a court of competent jurisdiction and is still in force, the copy and the probate thereof shall be filed and recorded, and the will shall have the same force and effect as if it had been originally proved and allowed in the same court), it is error to refuse probate of a foreign will where there was no controversy as to the foreign probate having been made by a court of competent jurisdiction, and the exemplified copy of the proceedings in the foreign jurisdiction shows them to be regular in every respect.
2. On application under sec. 3790, Stats. 1898, to probate a foreign will, the mere fact that some essentials of a valid original probate in this state are lacking will not authorize the county court to refuse it probate.

3. Under ch. 397, Laws of 1901 (providing, among other things, that any court of record, in contests arising therein, upon application for the probate of any will, in its discretion, may allow to the contestant, if successful in the circuit court, a reasonable attorney's fee out of said estate for services in such contest in the circuit court), the first court mentioned refers to the one having primary jurisdiction of the probate of wills—the county court—as the one given authority to allow attorney's fees and direct the payment thereof out of the estate.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Emer Gertsen died testate at her home in Cheyenne county, Nebraska, leaving property there and in Grant county, Wisconsin. She left a husband, who was her sole beneficiary, and two grandchildren, Albert and Charles Edwards, who were interested in her estate contingent upon the validity of the will. They were never residents of Nebraska. Proceedings were duly and successfully had in the home state to admit the will to probate, constructive notice only being given to absent interested parties. The minors were not represented by guardian *ad litem* or otherwise. In due time said beneficiary applied for probate of the will in Grant county under sec. 3790, Stats. 1898. All proceedings required thereby, essential to the jurisdiction of the court, were had, including appointment of a guardian *ad litem* for such minors. On the hearing an exemplified copy of the will and the record admitting it to probate as aforesaid were produced to the court. The application was denied. On appeal to the circuit court the judgment of the county court was affirmed, upon the sole ground that no guardian *ad litem* was appointed to represent the minors in the former proceeding. Judgment was entered accordingly, and that $75 be paid the contestant's attorneys out of the Emer Gertsen estate.

The cause was submitted for the appellant on the briefs of *Bushnell, Moses & Watkins,* and for the respondent on the brief of *George B. Clementson.*

MARSHALL, J. The judgment cannot be affirmed without a judicial repeal of sec. 3790, Stats. 1898. That statute is plain; it is constitutional; it is mandatory. All its provisions up to the decision of the court complained of were fully complied with. Then, whereas the statute says "the will shall have the same force and effect as if it had been originally proved and allowed in the same court," the learned court said otherwise, and such is the effect of the judgment before us.

The mistake was made, it seems, by looking to the essentials of a valid original probate of a will in this state, instead of such essentials in Nebraska. The language of the statute is not to the effect that if it appears that the former probate was according to the laws of this state the will shall be admitted in the secondary proceeding with like effect as if they were primary: to the contrary it says:

"If on the hearing it shall appear to the court that the order or decree admitting such will to probate was made by a court of competent jurisdiction, . . . the will shall have the same force and effect as if it had been originally proved and allowed in the same court."

There is no controversy but what the foreign probate was made by a court of competent jurisdiction. The exemplified copy of the proceedings in that regard is regular in every respect and that is not disputed.

We are unable to see any warrant for the award of $75 to the contestant for attorney's fees, and the direction for its payment out of the estate of Emer Gertsen. Respondent's counsel points to ch. 397, Laws of 1901, to sustain that part of the judgment. It seems the learned court gathered an erroneous idea therefrom. It says:

"Any court of record, in contests arising therein, upon application for the probate of any will, in its discretion, may . . . allow to the contestant if successful in the circuit court a reasonable attorney's fee out of said estate for services in such contest in said circuit court."

The first court mentioned refers unmistakably to the one having primary jurisdiction of the probate of wills. It is the court wherein the contest arises, the one of first instance—the county court—that is given authority to allow the attorney's fees and direct the payment thereof out of the estate.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to reverse the judgment or order of the county court, and to render judgment admitting the will to probate, with costs in favor of the proponent, and to remand the matter to the county court with directions to proceed therein according to law.

POST and another, Respondents, vs. ROBERTS, Appellant.

February 27—March 20, 1906.

Appeal and error: Bill of exceptions: Evidence not included therein: Presumptions: Fraudulent representations: Findings.

1. Evidence, consisting of maps referred to in the testimony as present on the trial, not brought before the supreme court in the bill of exceptions, will be presumed to have supported the findings made by the trial court.
2. In an action to set aside a land contract for misrepresentations as to the quantity of clay loam and of cultivated land, on the evidence, stated in the opinion, the representations are *held* to be both material and adequately proved.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

The complaint alleges and the court found that plaintiffs were induced to buy defendant's farm by reason of the latter's misrepresentation that the same contained 147 acres, of which ninety-one acres were under plow and cultivation and sixty acres thereof were clay loam, whereas the farm in fact contained only 127 acres, of which only seventy-eight acres were under cultivation and about forty acres were clay loam, on which representations plaintiffs relied, entered into a land con-

tract for the farm, and paid $1,000 down. Judgment was entered canceling said contract and adjudging defendant's liability for the $1,000 paid, together with interest from the date of its payment, from which judgment defendant appeals.

C. L. Hood, for the appellant.

George H. Gordon, for the respondents.

DODGE, J. A careful examination of the evidence fails to disclose any clear preponderance against the material findings of fact. Indeed, the only serious question is as to whether plaintiffs were so informed of the deficiency in the quantity of the land before purchasing that they cannot be deemed to have relied upon defendant's statement in that respect. On this, however, there is considerable conflict of evidence, and certain maps referred to therein present upon the trial below are not brought here in the bill of exceptions. Such maps may have served to strongly support the findings and, in their absence, such must be presumed to have been their effect. If they tended to the contrary, appellant should have incorporated them in the bill of exceptions. Independently of this subject, however, the misrepresentations as to the quantity of clay loam and of cultivated lands are both material and are adequately proved.

By the Court.—Judgment affirmed.

STEVENS, Respondent, vs. MODERN WOODMEN OF AMERICA, Appellant.

February 28—March 20, 1906.

Benefit insurance: Prohibited occupation: "Saloon bartender:" Forfeiture of insurance.

1. One who was not employed or paid compensation as a bartender is not a "saloon bartender" within the calls of a prohibition in that respect in a benefit insurance certificate, although while engaged in his duties as chore boy in a restaurant and saloon

he occasionally waited upon customers as an accommodation to his employer.

2. Engaging in an employment or occupation prohibited by the conditions of a contract with a benefit society has reference to the vocation or calling to which the insured devotes himself with some degree of permanency for hire or profit, and does not refer to acts which are simply incidentally connected with a regular employment.

APPEAL from a judgment of the circuit court for Juneau county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This is an action to recover on a policy of life insurance issued on the 7th day of August, 1894. Bertie Stevens, upon whose life the policy was issued, died April 28, 1904. The evidence showed that the insured, from the 20th day of January, 1904, until two days before his death, worked for his board and lodging for one Henry Miner, the proprietor of a restaurant. The owner of the restaurant also conducted a saloon business in an adjoining building. The deceased, according to the testimony at the trial, had been engaged as a chore boy, his work being to milk cows, split wood, and bring in water. Later he was engaged to do work in the saloon; to clean and put the place in proper order after the day's business, and to attend to the cleaning of the spittoons, the floor, and the bar. When the proprietor was busy about the saloon the deceased occasionally waited upon customers; he also did this at times in the absence of the owner. He was so engaged for periods of about half an hour, sometimes for a couple of days in succession, then again he would not so act for four or five days. He was not regularly engaged and employed to do this. Defendant claims exemption from liability under the following by-laws of the defendant society, which by the provisions of the benefit certificate were applicable to the insured:

"Division I.

"Sec. A. Persons, to become members, must be white males over eighteen and under forty-five years of age, of sound bodily health and mind, of exemplary habits, good moral charac-

ter, and engaged in an honorable and lawful business or vocation. Persons engaged in the following kinds of business or employment shall not be admitted as members of this fraternity: Railway brakeman, railway engineer, fireman, and switchman, miner, employee in gunpowder factory, wholesaler or manufacturer of liquors, saloonkeeper, saloon bartender, balloonist, sailor on the lakes or seas, plowgrinder and brassworker, professional baseball player, and professional fireman, or soldier in the regular army. If, after a person has become a member of this fraternity, he engages in any of the employments or occupations enumerated in section A, division I, of the fundamental laws, his certificate shall be forfeited by such act, and the same shall be null and void. Provided, however, that a neighbor may, after becoming such member, without invalidating his certificate, be employed as railway brakeman, engineer, fireman, or switchman, miner, plowgrinder, brassworker, professional baseball player, professional fireman, or employed in a gunpowder factory, or on the lakes or seas, or as a soldier in the regular army while in active service, if he shall, before entering upon any of the above-mentioned occupations, file with the head clerk a written waiver of any liability of this order on his benefit certificate founded upon the death of such neighbor, either as the result of accident occurring in, or disease directly traceable to, his employment in such prohibited occupation. Such waiver, if not filed before the member's entrance upon such prohibited occupation, shall have the same effect if filed at any time during his continuance of such employment, if accompanied by a certificate of sound bodily health. But this section shall not be construed as invalidating certificates issued prior to December 1, 1888."

"Sec. 12. *Membership forfeited by engaging in liquor business or upon conviction of felony.* Should any person who now is or who shall hereafter become a member of this society, hereafter enter upon the manufacture or sale of malt, spirituous, or vinous liquors to be used as a beverage, in the capacity of proprietor, stockholder, agent, or servant, or be convicted of a felony after being adopted into this society, he shall, *ipso facto,* forfeit all rights as a member of this society, either social or beneficial, and his certificate shall thereby become absolutely null and void, without any action on the part of his local camp, the head camp, or of this society, or of any of the

officers thereof; and the payment by him of any dues or assessments thereafter made, or the acceptance thereof by the officers of his local camp, or of the head camp, or of this society, shall not have the effect of waiving such forfeiture, or reinstating such certificate holder to any rights, benefits, or privileges as a member of the society."

The court directed the following special verdict:

"(1) Did the decedent, Stevens, work for Henry Miner at Pelican Lake, Wisconsin, from January 20, 1904, to two days prior to his death, which occurred the 28th day of April, 1904? Answered by the court: Yes. (2) Did said Stevens, in connection with such employment for said Miner and about a month after the beginning thereof, do any daily work or labor in the saloon of said Henry Miner? Answered by the court: Yes. (3) Did the said Stevens during such employment for said Miner sleep in a room directly back of the saloon of said Henry Miner? Answered by the court: Yes. (4) Did the said Stevens, in connection with such employment for said Miner, occasionally wait on guests in such saloon and provide them with spirituous or malt drinks or liquors from behind or over the saloon bar of said Miner? Answered by the court: Yes. (5) For how long a period of time did said Stevens, as a part of his work for said Miner, thus wait on guests with spirituous or malt drinks or liquors from behind or over the bar of said Miner? Answered by the court: One month. (6) Did said Stevens act as bartender for said Henry Miner during the latter's absence? Answered by the court: Yes; occasionally. (7) Did said Stevens help out as bartender occasionally for said Henry Miner? Answered by the court: Yes. (8) Did said Stevens hire out to said Miner as a bartender? Answered by the court: No. (9) Did said Stevens perform any of the ordinary or usual duties of a bartender for said Henry Miner? Answered by the court: Yes; occasionally. (10) Did said Stevens get pay from said Henry Miner as a bartender? Answered by the court: No. . . . (12) How much is the plaintiff entitled to on said insurance contract if the court shall finally determine that the defendant is liable? Answered by the court: $2,086.00 (two thousand and eighty-six dollars).

"April 20, 1905. F. E. Peck, Foreman."

Judgment was entered in plaintiff's favor for $2,086 and costs. This is an appeal from the judgment.

For the appellant there was a brief by *Benj. D. Smith,* attorney, and *Murphy & Kroncke,* of counsel, and oral argument by *Mr. Smith* and *Mr. George Kroncke.*

H. J. Mortensen, for the respondent.

SIEBECKER, J. It is the contention of appellant that the court erred in finding that the deceased was not engaged in the occupation or employment of a "saloon bartender," and that he was not engaged as agent or servant in the sale of malt or spirituous liquors to be used as a beverage. It is claimed that, by violating the fundamental law and the by-laws of the order, the insured forfeited all rights and claims under the benefit certificate whereon plaintiff bases her right to recover. The certificate issued to the insured provided that if he failed to comply with and to conform to any and all of the laws of the order, whether in force when the certificates issued or thereafter adopted, the certificate should be void. It also specified that if any person, after becoming a member of the order, engaged in any of the employments and occupations prohibited by its laws, the certificate issued to him should thereby be forfeited and of no further validity. By the fundamental laws of the order it was enacted that persons engaged in certain classes of business or employment, among which was specified the occupation of "saloon bartender," should not be admitted as members, and provided that engagement by a member in any of these employments or occupations should forfeit his certificate and render it void. The defendant adopted a by-law in 1903 prescribing that if any member should thereafter "enter upon the manufacture or sale of malt, spirituous, or vinous liquors to be used as a beverage, in the capacity of proprietor, stockholder, agent, or servant, . . . he shall, *ipso facto,* forfeit all rights as a member" and his certificate shall become void. Defendant insists that the insured

violated these provisions of its code and thereby forfeited his membership and his rights under the benefit certificate. In support of this contention it is urged that he engaged in the occupation or employment of a "saloon bartender" and as Mr. Miner's servant sold liquors to be used as a beverage. The trial court found that the insured performed work for Mr. Miner in his restaurant and in his saloon business from January 20, 1904, to April 26th following, and that his death occurred two days thereafter, and that he was not employed as a bartender, but to perform other services in and about the restaurant and saloon. It is shown that while he was so employed in the saloon he waited upon customers, both in the presence and the absence of his employer, who stated that he occasionally requested the deceased to wait upon customers at the bar. The evidence establishes the fact that Mr. Miner did not employ the deceased as a bartender, nor did he pay him any compensation for such services. The extent of the services performed by the deceased in this respect is that, when he was engaged in his employment in the restaurant and saloon, he waited upon customers as an accommodation to his employer at occasional instances. These occasional acts of performing the duties of a saloon bartender and selling liquor to be used as a beverage cannot be treated as being an employment in the prohibited occupation under the defendant's code of laws. Engaging in the employment or occupation prohibited by the conditions of the contract must be held to have reference to the vocation or calling to which an insured devotes himself with some degree of permanency for hire or profit, and it does not refer to acts which are simply incidentally connected with a regular employment. *Hall v. American M. Acc. Asso.* 86 Wis. 518, 57 N. W. 366; *Fox v. Masons' F. Acc. Asso.* 96 Wis. 390, 71 N. W. 363; *Comstock v. Fraternity Acc. Asso.* 116 Wis. 382, 93 N. W. 22; *Stone's Adm'rs v. U. S. C. Co.* 34 N. J. Law, 371; *Guiltinan v. Metropolitan L. Ins. Co.* 69 Vt. 469, 38 Atl. 315; *Union Mut.*

Acc. Asso. v. Frohard, 134 Ill. 228, 25 N. E. 642; *Wildey C. Co. v. Sheppard,* 61 Kan. 351, 59 Pac. 651; 15 Cyc. 1041, and note.

The finding of the trial court is sustained by the evidence, and the judgment was properly rendered awarding recovery on the benefit certificate.

By the Court.—Judgment affirmed.

KERWIN, J., took no part.

IN RE PAULSON'S WILL: PAULSON, Executrix, Respondent, vs. PAULSON, Appellant.

February 28—March 20, 1906.

Wills: Construction: Right of executor to appeal: Legacies: Contingent or vested: Intention of testator: Extrinsic evidence: Ambiguity: Identity of beneficiary: Constitutional law: Religious freedom: Condition in will: Requirement of legatee to attend church: Definiteness.

1. An executrix is an aggrieved party within the calls of sec. 4031, Stats. 1898, and entitled to appeal from an order or judgment of the county court construing a will, and hence it is not error to deny a motion to dismiss her appeal.
2. Testatrix bequeathed a sum of money to her son, to be paid in fifteen yearly instalments, on condition that he attend the regular meetings of a certain church, and, by a subsequent clause, provided that, if the son did not try in good faith to carry out the condition, the sum so bequeathed should go to a charitable society. *Held,* that the will did not vest in the son absolute title to the bequest, but that it was the intention of the testatrix that the bequest should pass subject to the conditions specified.
3. In the construction of a will the intention of the testator as expressed therein must govern.
4. In an action to construe a will, extrinsic evidence is admissible to show that a bequest to a charitable society, having no ex-

istence under the name used in the will, was in fact intended for an organization incorporated under another name.

5. A provision in a will making payment of a legacy conditioned upon the beneficiary having regularly attended a named church is not contrary to public policy, nor does it infringe the provisions of art. I, sec. 18, Const., declaring that the right of every man to worship according to the dictates of his own conscience shall never be infringed, and that no one shall be compelled to attend, erect, or support any place of worship or to maintain any ministry against his consent, and that the control of or interference with the right of conscience shall not be permitted.

6. Testatrix bequeathed $1,500 to her son, payable in equal annual instalments for a period of fifteen years, provided he should attend regular meetings of a named church. A subsequent clause provided that, if the son did not try in good faith to carry out the condition, the "$1,500" should go to a certain charitable society, to be paid in fifteen equal annual instalments commencing five years after testatrix's death. *Held:*

(1) The bequest was not void for uncertainty or indefiniteness.

(2) The questions as to whether the son had attended "regular meetings" of the church, or if he had not attended was excusable, were properly for the determination of the court, should judicial determination be necessary.

(3) The conditions attached, at least, during the time the fifteen annual payments were to be made.

(4) The provision for the payment of the "$1,500" over to the society referred to the portion remaining unpaid at the time of the son's default.

APPEAL from a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This action was brought for a construction of the will of Mary J. Paulson, of Cashton, Monroe county, Wisconsin, which reads as follows:

"First. After the payment of my just debts, funeral charges, and expenses of administration, I hereby give and bequeath to the Norwegian Home and Foreign Missionary Association the sum of four hundred ($400) dollars, to be paid by the executrix hereof in four equal annual payments.

"Second. I hereby give and bequeath to my beloved son,

Peter Paulson, the sum of fifteen hundred ($1,500) dollars, to be paid to him by said executrix in fifteen annual payments. This bequest is made conditional that my son attend the regular meetings of worship of the Emanuel Church near the village of Cashton, Wisconsin, when not sick in bed, or prevented by accident or other unavoidable occurrence.

"Third. In case my said son should die before the expiration of fifteen years, the remainder of said fifteen hundred ($1,500) dollars shall be paid by the said executrix to his children share and share alike.

"Fourth. If my son does not try in good faith to comply with my wishes in carrying out the above condition upon which his legacy is based, in that case I give and bequeath said fifteen hundred ($1,500) dollars to the Norwegian Lutheran Home and Foreign Missionary Association, to be paid by my said executrix in fifteen equal annual payments, commencing one year after the last payment mentioned in the first clause of this will.

"Fifth. I hereby give, devise, and bequeath all the rest, residue, and remainder of my property and estates of whatsoever kind unto my beloved daughter, *Matilda Paulson,* with whom I have lived and from whom I have received such thoughtful consideration and tender care in my declining years.

"Sixth. I hereby nominate, constitute, and appoint my beloved daughter *Matilda* sole executrix of this my last will and testament without bond, and authorize and empower her to settle, compound, or compromise any claim in favor of or against my said estate.

"In witness whereof I have hereunto set my hand and seal this 11th day of September, 1903.

"MARY $\overset{\text{her}}{\underset{\text{mark}}{\times}}$ J. PAULSON. [Seal.]"

Appellant applied to the county court of Monroe county asking that the bequest to him be construed, and the court held that the conditions attached to such bequest were void. Executrix appealed to the circuit court. Appellant moved to dismiss appeal on the ground that the executrix could not appeal, which motion was denied. The circuit court found that

the conditions attached to the bequest to appellant were valid, and directed judgment accordingly, which was entered, from which this appeal is taken.

A. H. Smith, of counsel, for the appellant.

Thorwald P. Abel, for the respondent.

KERWIN, J. 1. The question raised by the first assignment of error is whether the circuit court erred in not granting the motion of appellant to dismiss the appeal of the executrix from the order and judgment entered by the county court. It is plain from a reference to sec. 4031, Stats. 1898, that the executrix, *Matilda Paulson,* was an aggrieved party within the meaning of the statute, and as such entitled to appeal. This question was directly passed upon by this court in the late case of *McKenney v. Minahan,* 119 Wis. 651, 97 N. W. 489, and it was there held that an executor or administrator is an aggrieved party within the meaning of the statute, and has a right to appeal. The court below, therefore, was right in denying the motion to dismiss the appeal.

2. The court found, in effect, that the will was duly executed, and that the testatrix during her lifetime was a member of the Emanuel Church, two and one-half miles from Cashton, Wisconsin, and contributed to its support, which church was known as the "Moen Church;" that appellant, *Peter Paulson,* was also a member of such church, and that the testatrix paid his membership dues in the church during the year prior to her death; that there is no society known as the "Norwegian Home and Foreign Missionary Association," but that there is a society known as "The Home and Foreign Missions of the United Norwegian Lutheran Church of America," and that such society was connected with the Emanuel Church two and one-half miles southwest from Cashton; that the testatrix contributed to this society, and stated during her lifetime that she was going to make a gift to it; and, as conclusions of law, that the testatrix intended to make a bequest of

$1,500 to *Peter Paulson* upon the condition that he attend the regular meetings of Emanuel Church two and one-half miles southwest from Cashton, known as the "Moen Church," when not sick in bed or prevented by accident or other unavoidable occurrence; that by the fourth clause of said will the testatrix intended to and did give the bequest over to the Home and Foreign Missions of the United Norwegian Lutheran Church of America; and that the conditions annexed to the bequest to *Peter Paulson* in the second clause of the will were valid.

The errors complained of by appellant under these findings of fact and conclusions of law involve the following propositions: First. Whether the findings of fact are borne out by the will and the evidence. Second. Whether the will vested in *Peter Paulson* an absolute title to the gift at the death of the testatrix. Third. Whether the testatrix gave, or intended to give, the *Peter Paulson* bequest over to the Home and Foreign Missions of the United Norwegian Lutheran Church of America. Fourth. Whether the conditions annexed to the bequest to *Peter Paulson* are valid.

After a careful examination of the record we are convinced that the findings of fact are fully supported by the evidence, and therefore shall spend no time upon this branch of the case. We are unable to agree with counsel for appellant that the will vested absolute title to the $1,500 legacy in *Peter Paulson*. The first and most important question for determination is, What was the intention of the testatrix? and we think it clear from the terms of the will that it was her intention that the legacy should pass subject to the conditions specified. The provision that, if *Peter Paulson* should not in good faith try to comply with the terms imposed upon him, then and in such case the bequest should go over to the society named in the will, to be paid by the executrix in fifteen equal annual payments, commencing five years after the death of the testatrix, makes manifest her intention that

the legacy was upon condition attached to such gift, as found by the court below, and that the control and management of the legacy should remain with the executrix until the condition should be performed, or, in case of *Peter's* death during the fifteen years, the unpaid portion of such bequest should go to his children, share and share alike. It is true that legacies payable at a future time certain and not subject to condition precedent are vested, while, on the other hand, legacies made payable on conditions which may never happen and placed in the possession and under the control of a trustee and subject to condition precedent are contingent. *Scott v. West,* 63 Wis. 529, 566, 24 N. W. 161, 25 N. W. 18. And, when a future time for the payment of a legacy is defined by the will, the legacy may be vested or contingent as may appear to have been the intention of the testator upon a proper construction of the will. *Stark v. Conde,* 100 Wis. 633, 76 N. W. 600, and cases cited. But in all cases the intention of the testator as expressed in the will must govern. And it is quite clear in the case before us that the testarix intended the conditions should attach to the gift and defeat it upon failure on the part of the legatee to perform. For the purpose of enabling the executrix to carry out the trust in accordance with the terms of the will, the testatrix manifestly intended that possession and control of the bequest to *Peter Paulson* should remain in the executrix during the period necessary for the execution of the trust. *Scott v. West, supra.* The gift over to the Home and Foreign Missions of the United Norwegian Lutheran Church of America, in case of failure of performance of conditions by *Peter Paulson,* is definite and certain, and the intention of the testatrix clearly was that the gift over to this society was intended, although another name was inadvertently inserted in the will. Extrinsic evidence was admissible to explain the ambiguity. *Webster v. Morris,* 66 Wis. 379, 28 N. W. 353; *Sherwood v. Sherwood,* 45 Wis. 357. It is considered that the court below

was right in determining that the testatrix intended to make, and did make, the bequest to *Peter Paulson* upon the condition named in the will.

3. The main contention on the part of the appellant, and the one upon which he seems to rely for reversal, is to the effect that the condition attached to the bequest to *Peter Paulson* requiring him to "attend the regular meetings of worship of the Emanuel Church near the village of Cashton when not sick in bed or prevented by accident or other unavoidable occurrence," is void for the reasons (1) that it infringes art. I, sec. 18, Const.; (2) that it is void for uncertainty and indefiniteness.

Under the first head it is insisted that the condition referred to is repugnant to the constitutional provision that "the right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect, or support any place of worship or to maintain any ministry against his consent, nor shall any control of or interference with the right of conscience be permitted. . . ." It is not easy to see how the conditions attached to the will in any manner infringe this constitutional provision. The condition in question is neither against public policy nor contrary to law, nor can it be said that it interferes with the right of the legatee to worship God according to the dictates of his own conscience. The testatrix had the right to dispose of her property in such lawful manner as she saw fit, and make such person as she desired the object of her bounty, and in so doing attach to the bequest any lawful condition. She attached to the bequest in question a condition that the legatee attend the regular meetings of her church and the church to which he also belonged, so far as the evidence shows. We are unable to see that this condition contained anything against public policy or was unlawful. The testatrix has the right to so dispose of her property, and the legatee might accept or reject

the gift voluntarily, without restriction upon his will or coercion of his conscience. In *Barry v. Order of C. K.* 119 Wis. 362, 96 N. W. 797, where the articles of incorporation and the constitution of a benefit society organized for the sole benefit of the members of the Roman Catholic Church provided that none but practical Catholics could be admitted, and must remain such in order to participate in the benefits, the applicant, having agreed that upon failure to conform strictly to the constitution he should forfeit all right of membership and benefits, afterwards failed to comply with the conditions, and was excommunicated and ceased to be a Catholic, and it was held that all liability on a benefit certificate ceased, and that the provisions mentioned were not contrary to public policy, and did not interfere with any rights of conscience and imposed no religious test within the meaning of the constitution. The cases appear to be quite uniform on the subject, and hold that such provisions are not unlawful or against public policy, or any infringement of the constitutional provisions referred to. In *Magee v. O'Neill,* 19 S. C. 170, 45 Am. Rep. 765, where the bequest was on condition that the beneficiary be educated in the Roman Catholic faith, the court said:

"The power of disposition is general. The power to give includes the right to withhold or to fix the terms of gift, no matter how whimsical or capricious they may be, only provided they do not in any way violate the law. Mr. Magee, in his lifetime, could have given money to educate his granddaughter at a particular school, or he could have withheld it at his pleasure. Suppose he had entered into a covenant with Elizabeth or her mother that, if she was educated at a particular school named and under certain religious influences, he would, upon her attaining twenty-one years, pay to her $5,000. We suppose that, if she were not so educated, she could not go into the court and recover the money. Suppose, further, that before the time for payment arrived John Magee had died; would that strengthen her claim to recover the money against his personal representatives? We are unable

to see any material difference in regard to the necessity of complying with the terms imposed between this supposed case and that of a voluntary gift by will."

The provisions in *Girard's Will* (*Vidal v. Girard's Ex'rs*, 2 How. 127), excluding all ecclesiastics, missionaries, and ministers, of any sort, from holding or exercising any station or duty in the college, or visiting it, or the limitation of the instructions to be given to the scholars to pure morality, general benevolence, sobriety, and industry, were not so derogatory and hostile to the Christian religion as to render the devise void; and in *Barnum v. Baltimore*, 62 Md. 275, the court held that a devise on condition that the devisee withdraw from the priesthood of the church, or from any society connected therewith, was not unlawful. In *In re Knox* (1889) 23 L. R. (Ir.) 542, it was held that a gift to a son on condition that he should marry a Protestant wife, the daughter of Protestant parents, who have always been Protestants, was held to be valid. But it is unnecessary to pursue further the authorities upon this subject. We think it is well established that the condition is not contrary to public policy and does not infringe the constitutional provision. *Barry v. Order of C. K.* 119 Wis. 362, 96 N. W. 797; *Vidal v. Girard's Ex'rs, supra; Barnum v. Baltimore, supra; Dickson's Trust*, 1 Sim. N. S. 37; *Spencer v. See*, 5 Redf. 442; *In re Knox, supra; Mazurkiewicz v. St. Adelburtus Aid Soc.* 127 Mich. 145, 86 N. W. 543; *Franta v. Bohemian R. C. C. U.* 164 Mo. 304, 63 S. W. 1100.

Nor do we think the contention that the condition is void for uncertainty and indefiniteness tenable. It is said there is nothing to indicate when the attendance at church is to commence, nor how long it is to continue, nor who is to judge whether *Peter Paulson* has attended the "regular meetings" of the church named, and, if he has not attended, who is to be the judge whether or not he was "sick in bed." But we think all of these questions are properly for the determination of

the court in case judicial determination should be necessary. It does not seem that they are incapable of judicial determination, or that the conditions are so uncertain and indefinite that a court could not determine whether they had been performed. The church is designated. The regular meetings required to be attended are specified. And, while the period of time of attendance is not stated, we think it a proper matter of judicial determination under all the terms of the will. It is reasonable to suppose, in view of the fact that the will provides fifteen annual payments, that the conditions upon which these payments are based should be performed during that period of time at least. It was also suggested at the bar that the proviso for paying the whole amount over to the society in case of default on *Peter Paulson's* part was indefinite, since the whole amount could not be paid if a portion had been paid to *Peter* in annual instalments before default. We think the will must be construed to mean that such portion as remained unpaid at time of default should be paid over to the society, and that the performance of the conditions should be continued during the fifteen years designated for the payment of the legacy. In construing this clause, as in all other questions of construction, the intention of the testatrix must be sought for, and it is very obvious that the inducement for the bequest to *Peter* was that he be and continue to be a practical member of her church and a regular attendant, not for a limited time, but continually, at least for the period covered by the annual payments; and it is not reasonable to suppose that she intended that payments should continue in default of the performance of the conditions, the main object of the gift obviously being that he continue such attendance. Moreover, the plain meaning of the language that he attend the regular meetings without limitation as to time must be held to mean, under the circumstances of the case, to require such attendance during the period designated for the payment of the bequest. We think, therefore,

that it was the intention of the testatrix that *Peter* should continue to perform the conditions of the will during the period of fifteen years while the bequest was being paid to him, and that, if during said time he should fail to do so, the remaining portion of the $1,500 should be paid over to the society named in the will in the manner designated, and, if *Peter* should die before the expiration of fifteen years, the remainder should be paid to his children, share and share alike. We are therefore of the opinion that the judgment below should be affirmed.

By the Court.—Judgment affirmed.

LA CROSSE PLOW COMPANY, Respondent, vs. HELGESON, Appellant.

February 28—March 20, 1906.

Sale of articles known to the trade: Implied warranty: Express warranty: Evidence.

1. Where one contracts for a known specified and described article—as a Northwestern cream separator—which is a known article of manufacture in the trade, and receives that article, there is no implied warranty of fitness for any purpose, and, if the purchaser obtains no express warranty, he assumes the risk of fitness.
2. Where an express warranty of workmanship and material is given, it excludes an implied warranty of fitness, and hence testimony offered tending to show unfitness is properly rejected.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *C. J. Smith* and *C. W. Graves,* and oral argument by *Mr. Graves.*

For the respondent there was a brief by *McConnell & Schweizer,* and oral argument by *Mr. Schweizer.*

WINSLOW, J. This is an action to recover the purchase price of ten cream separators sold and delivered by the plaintiff corporation to the defendant under a written contract which warranted them to be of good material and workmanship, and further provided that:

"No implement returned under warranty will be credited in account, but will be made good and returned or other implement sent in its place as you [the purchaser] may select."

The separators so contracted for and delivered were not manufactured by the plaintiff, but by another manufacturing firm, and were called "Northwestern Cream Separator." The defendant admitted the sale and delivery, and pleaded by way of counterclaim that the separators were warranted to be fit and proper machines for separating cream from milk, and that they were not fit and proper for that purpose and would not perform the work they were warranted to do, and that the defendant was damaged thereby to an amount exceeding the purchase price. At the close of the evidence a verdict for the plaintiff for the purchase price of the machines was directed, and the defendant appeals.

It seems to us very clear that the verdict was rightly directed, for at least two reasons.

1. The cream separators ordered and sold were the "Northwestern Cream Separators," which were known articles of manufacture in the trade. The defendant received exactly the articles which he contracted for. The rule is that when a person contracts for a known specified and described article, and receives that article, there is no implied warranty of fitness for any purpose. If the purchaser obtains no express warranty, he assumes the risk of fitness. *Milwaukee B. Co. v. Duncan*, 87 Wis. 120, 58 N. W. 232.

2. There was an express warranty of workmanship and material given, and this excludes an implied warranty of fitness, so the testimony which was offered tending to show that certain of the machines did not satisfactorily separate cream

from milk was properly rejected. *J. I. Case P. Works v. Niles & Scott Co.* 90 Wis. 590, 63 N. W. 1013.

By the Court.—Judgment affirmed.

BEKKEDAL, Receiver, Respondent, vs. JOHNSON, Appellant.

February 28—March 20, 1906.

Chattel mortgages: Foreclosure: Regulation: Statutes: Pleading: Demurrer: Defenses: Receivers: Property in custodia legis: *Report of sale: Retroactive laws: Constitutional law.*

1. Under sec. 2316*a*, Stats. 1898 (providing that property taken under a chattel mortgage shall not be sold within five days after the taking without the mortgagor's consent; that any person aggrieved by a violation thereof may recover of the violator actual damages and $25 in addition as liquidated damages; and that in case of any such property being sold at private sale without public notice, or sold within the five-day period without the mortgagee's consent, the mortgage indebtedness shall be deemed paid and the mortgage canceled), an answer in an action on a promissory note secured by a chattel mortgage, alleging a sale of the mortgaged property without public notice, states a good defense.
2. While sec. 2316*a*, Stats. 1898, does not prohibit a sale without public notice, and while it is competent for the mortgagor to waive the statutory privilege of such notice, where the pleading alleging the invalidity of the sale for lack of such notice does not show any such waiver, none can be presumed to support a demurrer thereto.
3. Under sec. 2316*a*, Stats. 1898, the clause as to selling without notice is not limited to sales within the five-day period, but applies also to sales "at private sale without public notice."
4. Courts, as well as individuals, in the mere administration of contract obligations in a representative capacity are bound by the law in respect thereto the same as the original possessor of the property affected thereby, and hence the fact that chattel-mortgaged property was *in custodia legis* at the time of making a sale without the public notice required by sec. 2316*a*, Stats. 1898, does not relieve the sale of the consequences imposed by that section.

5. Ch. 122, Laws of 1903 (requiring the filing of a report of a sale of chattel-mortgaged property), is not a mere remedial statute, but it is designed that its features shall be regarded as incorporated into future mortgage contracts.
6. Ch. 122, Laws of 1903, does not apply to mortgages in force before it took effect, otherwise it would fall within the prohibition against legislation impairing the obligation of contracts.
7. Under sec. 2316*a*, Stats. 1898, the clause as to liquidated damages relates to the five-day period only, and does not cover sales made without public notice more than five days after the taking possession of the mortgaged property.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Reversed.*

The complaint was in form to recover on a promissory note held by a receiver of a private bank.

Defendant, for a first defense, pleaded that a chattel mortgage, given to secure the note, came therewith to the possession of the receiver; that thereunder he took the property described therein January 1, 1903, and in April, 1904, sold the same without public notice, whereby, under sec. 2316*a*, Stats. 1898, both the note and mortgage became extinguished.

For a further defense the same facts were pleaded and others in addition to the effect that plaintiff, who conducted the sale, failed to file in the clerk's office, where the mortgage was filed, an affidavit setting forth the date of sale, description of the property sold, sum claimed to be due on the debt secured by the mortgage, amount realized by the sale, a statement in detail of the expenses of sale, including the cost of taking and keeping the property pending the sale, and attaching thereto a copy of any notice of sale given, whereby, under ch. 122, Laws of 1903, the note and mortgage became extinguished.

For a counterclaim the same facts were pleaded with a conclusion that by reason thereof, under the statute, there accrued to defendant a claim for $25 as liquidated damages.

Plaintiff demurred generally to the answer, for insuffi-

ciency, and to the counterclaim on the same ground, and the demurrer was sustained.

The cause was submitted on the brief of *C. J. Smith* for the appellant, and on that of *C. W. Graves* for the respondent.

MARSHALL, J. Sec. 2316*a*, Stats. 1898, provides that property taken under a chattel mortgage shall not be sold within five days after the taking without the mortgagor's consent; that any person aggrieved by a violation thereof may recover of the violator actual damages and $25 in addition as liquidated damages, and that in case of any such property being sold at private sale without public notice, or sold within the five-day period without the mortgagor's consent, the mortgage indebtedness shall be deemed paid and the mortgage canceled. It will thus be seen that the answer contained a good defense, in that it alleged a sale of mortgaged property without public notice. True, as counsel for respondent contends, the statute does not prohibit such a sale: therefore, a sale of that character may be made without affecting the indebtedness not paid by the proceeds, if the mortgage provides, in terms, for a sale with or without notice. *Vreeland v. Waddell,* 93 Wis. 107, 67 N. W. 51. That is because it is competent for the mortgagor, in the mortgage, to waive the statutory privilege; which is regarded as done by including in the mortgage, expressly, power to sell *with or without notice.* The difficulty with respondent's position is that the pleadings do not show any such waiver. None can be presumed in favor of the demurrer. As the answer stands it satisfies every essential of a defense to the plaintiff's cause of action under the statute, unless other points made by counsel for respondent are controlling.

It is said that the clause as to selling without notice only applies to sales within the five-day period. It plainly indicates otherwise. There was no reason for regulating sales absolutely prohibited. So it was said, in case of any sale "at

private sale without public notice" or sale "within the period herein limited," etc., the mortgage indebtedness and the mortgage shall be deemed extinguished. The latter clause relates unmistakably to the prohibitive clause and the former to occurrences after the five-day period.

The further point is made that since the property at the time of the sale was *in custodia legis* the court would not be bound by the statute as to the manner of making sale thereof, and therefore its receiver was not. The authorities to which counsel refers us on that do not support the proposition. On principle, a court, superseding a person as to his contract rights, takes the same with their incidents. The court, as well as individuals, in the mere administration of contract obligations in a representative capacity, is bound by the law in respect thereto the same as was the original possessor. That is well illustrated by the holding that the appointment of a receiver does not affect the running of the statute of limitations as to matters devolving upon him by the appointment. *Fincke v. Funke,* 25 Hun, 616; *Whitley v. Lowe,* 2 De G. & J. 704.

The defense under ch. 122, Laws of 1903, must fail because the law was not in force when the mortgage was given. It is not a mere remedial statute. It was designed that its features should be regarded as incorporated into mortgage contracts. If it was read as having a retroactive effect, applying to mortgages antedating its enactment, it would fall within the prohibition against legislation impairing the obligation of contracts. *Eau Claire Nat. Bank v. Macauley,* 101 Wis. 304, 77 N. W. 176; *Peninsular L. & C. Works v. Union O. & P. Co.* 100 Wis. 488, 76 N. W. 359.

What has been said sustains the demurrer to the counterclaim, as regards the law of 1903. There is no clear indication whether the pleader had that in mind or sec. 2316*a* of the Statutes. Possibly either was regarded as sufficient. The clause as to liquidated damages in the statute relates to the

five-day period only, not to the clause as to sale after the expiration thereof.

The result is that the demurrer to the counterclaim was properly sustained, but the answer otherwise contained a good defense under sec. 2316*a*, and therefore the general demurrer to the answer should have been overruled.

By the Court.—The order appealed from, so far as it sustains the general demurrer to the answer for insufficiency, is reversed, and the cause is remanded with directions to overrule such general demurrer and to proceed further according to law.

GATES, Respondent, vs. PAUL, Appellant.

March 1—March 20, 1906.

Judgments: Interlocutory judgments: Conclusiveness: Findings of referee: Appeal: Partnership: Accounting.

1. Under sec. 2883, Stats. 1898 (providing that an interlocutory judgment may be made disposing of all issues covered by the findings or decision and reserving further questions until the report, verdict, or subsequent findings), an interlocutory judgment substantially settling all the rights of the parties except those expressly reserved for further decision, having been affirmed by the supreme court with certain modifications, is conclusive, except as to those matters reserved.
2. In an action for the dissolution of a partnership and an accounting, an interlocutory judgment was entered reserving certain matters for further decision. Thereafter the matters reserved were tried by a referee and the findings of the referee are *held* supported by a preponderance of the evidence.

APPEAL from a judgment of the circuit court for La Crosse county: CHAS. M. WEBB, Judge. *Modified and affirmed.*

This is an appeal from final judgment entered in the same case considered by this court in 117 Wis. 170, 94 N. W. 55. Upon *remittitur* from this court the reference was taken up

and a large amount of evidence introduced, including evidence tending to prove that misrepresentations were made by plaintiff to defendant as an inducement to purchase the schedule A lands, whereby he was induced to believe their value to have been much greater than it was and to pay for five sixths thereof $57,200, while, in fact, their value was much less, also tending to prove that no title was conveyed to defendant by plaintiff's deed of the D lands; that defendant supposed he was receiving a warranty deed while, in fact, the instrument only contained a warranty against acts of the plaintiff. At the close of the testimony the referee made findings that defendant had expended for taxes upon the A lands $2,212.10 (changed by the court to $3,212.10); also had necessarily expended in addition on account of said lands $1,231.88 (changed by the court to $653); that plaintiff was entitled to no credits by reason of earnings or profits derived from the lands; that the transaction of organizing the corporation, East Coast Lumber Company, had between the defendant, Withee, and Gile, to whom the defendant had conveyed certain shares of various tracts of land in Florida and Georgia, consisted in a transfer of those lands to the corporation and the payment at the time of incorporating of certain sums of money and the issue of stock to each upon the basis of $1.489 of stock at par value for each $1 contributed by each of the incorporators either toward the acquirement of those lands or to the treasury of the corporation at the time of incorporating; that the amount paid by *Paul* and his associates in the purchase of the A lands was $57,200, and that, therefore, there had been issued stock on account of the five sixths of the A lands owned by *Paul* and his associates, and transferred to the corporation stock in proportion aforesaid, and that, at the same rate, the one sixth thereof, which belonged to the plaintiff, represented a value of $11,440, so that he held that 148.9 per cent. of this, or $17,043.16, was the amount of stock issued upon account of the one sixth of those

lands belonging to the plaintiff; that plaintiff's one sixth of the D lands had in no manner been transferred to the corporation, and no stock had been issued on account thereof. Both parties alleged exceptions to those findings and report of the referee, and the defendant moved for leave to amend his answer so as to allege (1) that he had been defrauded by misrepresentations of *Gates* as to the quality and value of the A lands to the extent of $30,000; (2) that he had failed to receive a warranty deed or any title of the D lands and had lost the entire consideration of $7,200 paid therefor. The court denied the motion to amend and overruled all of defendant's exceptions, except as to the amount of taxes paid on the A lands, as to which no dispute is here made, and sustained plaintiff's exceptions and amended the findings as by him requested: (1) with reference to the expenses incurred, as above stated, and as to which no question is raised, and made findings that neither the D, E, F, nor G lands were ever transferred to the corporation; that all of its 5,000 shares of stock had been issued; that 3,462.30 shares were issued for the various parcels of land transferred to it at agreed prices; 289 shares for money paid to the said corporation, and that the remaining 1,248.70 shares of stock were issued without consideration, and that one sixth of the lands described in Exhibit A are represented in said corporation by 2535/37515 of its stock, namely, 337.85 shares thereof, and accordingly judgment was entered that plaintiff pay into court for the defendant the $2,280, as adjudged by this court on the former appeal, and $553.33 as one sixth of the taxes paid, together with interest on both said sums from April 16, 1895, and also the sum of $108.83, being one sixth of the other expenses incurred by defendant, with interest from the commencement of the suit, and that, upon such payment less taxed costs, defendant execute to plaintiff conveyance of an undivided one-sixth of the D lands and procure to be transferred to him on

the books of the corporation 337.85 shares of its stock. From this judgment the defendant appeals.

G. M. Woodward and *E. C. Higbee*, attorneys, and *C. D. Rinehart*, of counsel, for the appellant.

For the respondent there was a brief by *George H. Gordon*, attorney, and *Winkler, Flanders, Smith, Bottum & Fawsett*, of counsel, and oral argument by *Mr. Gordon* and *Mr. F. C. Winkler*.

DODGE, J. The interlocutory judgment in this case substantially settled all the rights of the parties except those expressly reserved for further decision, in this respect according with the provisions of sec. 2883, Stats. 1898, providing that an interlocutory judgment may be made disposing of all issues covered by the finding or decision and reserving further questions until the report, verdict, or subsequent finding. That judgment having been affirmed by this court with certain modifications is conclusive, except as to the matters reserved. It decided that defendant held one sixth of the A and D lands in trust for the plaintiff; that the plaintiff is chargeable with certain specific amounts and with the taxes paid by the defendant on account of such one-sixth interest and any other necessary expenses paid by the defendant on account thereof, less any income derived therefrom; and that the plaintiff is entitled to receive from the defendant such proportion of the shares of the East Coast Lumber Company as are fairly and equitably represented by plaintiff's one-sixth interest in the lands described in Exhibit A, also by his one-sixth interest in the lands described in Exhibit D, if the same shall be found to have been conveyed to that corporation. There were, therefore, left open for future consideration the questions of the amount of taxes and other expenses paid by the defendant, conveyance of the plaintiff's one-sixth interest in the D lands to the corporation, and the amount of capital

stock issued by the corporation by reason of the receipt by it of the plaintiff's interest in the lands. This last question became confined to the one-sixth interest in the A lands upon its appearing, as it does without dispute, that the one-sixth interest in the D lands has never been conveyed away by defendant, and can be reconveyed to plaintiff. The application to amend the answer by setting up: (1) the failure of title to the D lands; and (2) misrepresentation as to the quality of the A lands, was properly denied, for the reason that no such amendments were necessary. Such questions, if they bore in any way upon the equitable rights of the plaintiff to receive any sums from the defendant, were open under the pleadings as they already existed, and evidence was admissible upon them just as it was admissible upon the question of plaintiff's misrepresentation as to the amount paid for the D lands upon which this court passed in correction and modification of the trial court's interlocutory judgment. As stated in our former opinion, any evidence which the defendant considered necessary by reason of the amendment to plaintiff's cause of action, he had ample opportunity to apply to the trial court for leave to introduce before that judgment, and, doubtless, so far as any such evidence bore upon the issues submitted to the referee, it was admissible without any amendment.

Among the issues so submitted by reference, the only one of special importance upon this appeal is the amount of stock issued by the corporation fairly and equitably represented by plaintiff's one-sixth interest in the A lands. This, of course, depends on what was the transaction in fact had between the defendant and his associates, Withee and Gile, with reference to the organization of the corporation and the consideration for which the stock was issued by it. As preliminary to that transaction, which took place in December, 1896, and January, 1897, it must be borne in mind that for some two years or more *Mr. Paul,* in this association, had been making large investments in timber lands in Florida and Georgia, involv-

ing extended negotiations for, and examinations of, numerous different tracts, as to some of which the negotiations resulted in purchase either of the whole title or of some interest therein, and as to others fell through without result, and, in some cases, lands for which money had been spent were apparently deemed not worth conveying to the company. In this situation it was first proposed that certain tracts of land, to which the parties had contributed in greater or less proportion, and were understood between themselves to have interests accordingly, should be turned over to the corporation at a certain specified price per acre, payable in stock at par, and that money enough should be further contributed by the several partners to supply the treasury for the prospective erection of mill, railroad, etc., for which the balance of the stock should be issued at par. On this basis the lands were to represent about $384,000 and additional money to the amount of about $116,000 was to be contributed. It is claimed by the defendant that this method was abandoned and that, in lieu thereof, it was decided to treat the moneys which had already been contributed by the several members to the enterprise as above described and the moneys which they were able or ready to contribute at the time of the forming of the corporation on the same basis, and to issue therefor substantially the whole stock of the corporation, and that it was ascertained by accounting among them that they had already contributed about $234,000, and agreed to supply in cash to the treasury about $83,000 more. Thereupon they agreed to issue stock at the percentage of 1.489 dollars par value for each dollar so contributed. The amounts were slightly varied, so that this resulted in an issue of stock of 4,271 shares, leaving 279 shares unissued. Of this 3,350 were issued to the defendant *John Paul,* 848 to Withee, and 523 to Gile. The referee held that the adoption of the latter plan was established by the evidence and that, therefore, it must be held that so much stock was issued by the corporation on account of the A lands

as equaled 1.489 dollars of the money which was shown to have been invested in those lands up to the time of the organization of the corporation. On exception to the referee's report and findings, the court held that the evidence established that the Exhibit A lands were transferred to the corporation at an agreed price of $1.25 per acre, as in accordance with the original scheme above mentioned, and held that stock at this price for one sixth of the A lands belonged to plaintiff together with one sixth of a quantity of stock which he held to have been issued without any consideration whatever, because certain lands ostensibly involved in the capitalization had never been conveyed to the corporation, and because he held the evidence insufficient to establish the payment of any money into the treasury of the corporation by the defendant *Paul.*

It will hardly be justifiable to attempt a review of the large amount of evidence, oral and documentary, upon which these findings were based. We have examined it with care, and have reached the conclusion that the general plan of incorporation and stock issued as found by the referee is supported by a preponderance of such evidence. It may, however, be advisable to mention a few of the more salient circumstances which we deem persuasive. The two theories above outlined, namely, that of the issue of stock in proportion to the money contribution to the pool both before and at the organization of the corporation, which we shall designate as the referee's theory, and that of the issue of stock at a certain fixed price per acre, which may be referred to as the court's theory, are each supported by some parol testimony. The defendant did testify on two occasions that the A lands were put into the corporation for stock at $1.25 an acre, but he modified this by saying that was the price at which they were carried in the inventory and that the details of the bargain and issue of stock were arranged by his son and not by him. The son who had charge of the matter testifies positively that the original

plan of issuing stock according to price per acre was abandoned, and the plan according to the referee's theory was adopted. As between these there is, first, the extreme improbability that these three men, all business men and capable of appreciating their own interests, should have met upon the court's theory, for we find that the prices named on the lands were entirely arbitrary, having little or no relation to their actual cost, in some cases being nearly threefold, and in others less than twice such cost, and that those lands were owned by the three incorporators in widely different proportions. Thus, the Westinghouse lands were owned, one half by *Paul* and one quarter each by Withee and Gile. The Land & Trust lands were owned, approximately three fourths by *Paul* and one eighth each by Withee and Gile, and another considerable tract of land was owned entirely by *Paul* and another was owned by *Paul* and Withee, to the exclusion of Gile; hence whatever margin of profit existed between the cost price and the stipulated price for these lands at which they were first proposed to be turned into the corporation, resulted in a substantial advantage in favor of *Paul* over both the others and in favor of *Paul* and Withee over Gile. It is entirely probable that when such plan was considered carefully it would have been rejected, while, on the other hand, a proposition to consider each dollar of actual investment as entitled to an equal interest in the corporation was likely to be approved. Each of the two theories is claimed to be supported by certain documents made at the time of the organization of the corporation. One is known as Exhibit 6, and contains a plan for the issue of stock mainly at a fixed price per acre for the land and about $116,000 thereof for money, resulting in a proportion of the stock quite inconsistent with that finally issued, but especially involving payments of money by the several incorporators in very different amounts and proportions from that of which there is any evidence. Thus upon that plan Mr. Gile was to pay in $13,760, while,

confessedly, he only paid $1,000; and *Mr. Paul* was to pay some $78,000, while his utmost claim is that he paid in $58,900. On the other hand are three computations known as Exhibits 10, 11; and 12, fully testified to by R. H. Paul as the original memoranda upon which the stock was issued, and also established and identified by a bookkeeper as made by him for that purpose. These accord almost exactly with the stock concededly issued to each of the members of the pool, and, upon their face, fully confirm the referee's theory. In answer to this, however, it is asserted, first, that the amount of money by these documents declared to have been invested in the so-called pool prior to the organization of the corporation, to wit, about $234,000, is shown to be impossible to demonstration, and counsel presents a list of the elsewhere stated cost price of the various tracts of land going into the corporation other than the so-called Land & Trust lands (also called Exhibit G lands), which amount is only $81,000. This amount is not accurate, but shown by other incidental evidence to have been somewhat larger. He says the record is silent as to the cost of the Exhibit G lands, which were about 91,000 acres. There is no positive evidence of just the price which was paid for these lands. They were the subject of long negotiation with different parties, and it does appear that the party from whom *Mr. Paul* finally purchased them paid a little more than $1 an acre for them shortly before their sale to *Paul,* which perhaps supports an inference that *Mr. Paul* paid more, and this is confirmed by a letter from the plaintiff written at about the time of the organization of the corporation, to wit, February 2, 1897, stating that the land now held in Florida and Georgia cost purchase price $190,165. This, of course, would be exclusive of any expenditures upon lands by *Paul* with the purchase of which *Gates* had nothing to do. It also appears by Exhibit 6 that the G lands were treated by the corporators as having cost up to that time $1.50 per acre, or $137,000. Now, it is apparent from all

the evidence and correspondence that most of the lands purchased were burdened with an arrearage of taxes and, in addition, there had been one, two, or three years of taxes between the time of acquiring the lands and of the incorporation. Upon the A lands alone, where there was only one year of arrears, the taxes paid prior to incorporation amounted to nearly $5,000, and it is presumptively true that large amounts also had to be expended on the other properties. In addition to this, it is apparent that much expense had been incurred during 1894, 1895, and 1896 by *Mr. Paul* and persons employed by him in negotiating for various other tracts, making inspection thereof, investigating titles, procuring options, and in efforts to obtain possession and evict opposing claimants by litigation, etc., which might well have reached a very substantial figure. So that we cannot agree with counsel's inference that a total of $234,000 in land purchases may not have been expended in such efforts and in the work which had been done in the way of preparation to log and manufacture this timber before the corporation was organized. A further ground for the rejection of the referee's theory was the refusal of the court to believe that defendant contributed any money or equivalent, beyond his interest in the lands at or about the time of incorporating, as consideration for the stock issued to him. The amount claimed and found by the referee to have been contributed then was $58,900 by *Paul,* $19,846 by Withee, and $1,060 by Gile, total $79,800. With reference to this payment by defendant there is positive evidence of defendant and Withee that he did contribute some considerable amount, while R. H. Paul testifies positively to that amount and it is confirmed by Exhibit 12, already referred to. True, it does not appear that he gave his check to the treasurer of the East Coast Lumber Company, but that he passed the amount to its credit on the books of John Paul Lumber Company, on which they seemed to have drawn in large amount for the expenses of erecting their plant, rail-

road, etc., being indebted to it some $127,000 in November, 1899. Against this there is no evidence, except perhaps the suspicion resulting from the failure to produce the books of the East Coast Company or of the John Paul Lumber Company. But the fact that substantially the amounts of money specified in Exhibits 10, 11, and 12 were received by the corporation in addition to its timber lands is rendered certain to demonstration by a document known as Exhibit 5, which was a statement of the assets and property of the corporation and of the business done by it since its inception, made November 1, 1899, and which shows that, apart from the ordinary mercantile transactions, which substantially balanced each other, the company had borrowed from John Paul Lumber Company $127,800 in excess of payments to it and had received as proceeds of its lumber operations, in excess of the detail cost thereof, $66,800, and that it had constructed and acquired properties in the way of mill plant and railroad, additional real estate and timber leases and other equipment costing approximately $280,000; so that the corporation must have had about $80,000 of money capital besides what it borrowed and received from its business and besides its timber lands. The total shown to have been contributed by Exhibits 10, 11, and 12, inclusive of *Mr. Paul's* $58,900, is either $79,800 or $82,900, subject to some uncertainty as to a $3,100 item. Add to this the extreme improbability that Mr. Withee and Mr. Gile would, upon organization of the corporation, have contributed their money without seeing to it that *Mr. Paul* contributed that which he ought to on the same basis, and we feel that the repudiation by the court of the testimony that he did so pay is against a very clear preponderance of the evidence.

Another transaction had in November, 1899, may perhaps as well be mentioned here. It has no particular effect upon results derived from the referee's theory, but was deemed material by the court because of the holding that *Mr. Paul* did

not pay anything for the stock which he then received. It will be remembered that in the original organization there were left 279 shares of unissued stock. At a meeting of the corporation in November, 1899, it was decided to sell said stock at par for money to the existing members of the corporation in the proportion of their then holdings, and, as claimed by the defendant, it was thereupon so issued, 198 shares to *John Paul,* fifty shares to Withee, and thirty-one shares to Gile. Confessedly, both Gile and Withee paid dollar for dollar for their stock, but the court held there was no sufficient evidence of the payment by *Paul* of his $19,800. Such payment was testified to by R. H. Paul and John J. Paul, and the arrangement was testified to by Mr. Tiffany, who represented the interest of Gile, then deceased, and who at this time became a director of the corporation, representing the interest of Mr. Gile's estate. Against this there is no particle of evidence and no reason for disbelieving it, except possibly nonproduction of the books. Now it is inconceivable that *Mr. Paul,* having agreed to pay this money, and being, in practical effect, through the medium of the John Paul Lumber Company, a creditor to the extent of $127,000, failed to contribute it either by money or by credit upon such account, as it is testified he did. No business man situated as Mr. Tiffany was would fail to see to it that his associate made this substantial contribution in consideration for the stock which he then received upon agreement so to do. We find it impossible to escape the conclusion that this money was also paid upon a perfectly valid agreement among all the stockholders as the price for the stock then issued to *Mr. Paul.* By that transaction it was all issued for money consideration and none of it for any interest in the A lands.

At about this same time defendant made deed to the corporation of the remaining one sixth of the A lands, of which it will be remembered he deeded only five sixths at the organization. It was defendant's claim that *Gates's* only right was

to acquire one sixth of these lands by payment of a proportionate part of the cost within one year, which at this time had fully expired; hence conveyance of them without further consideration was entirely consistent with the referee's theory that stock was issued in consideration of the money invested, for, upon that theory, the corporation should receive whatever had been acquired by *Paul* as the result of such investment. There is no evidence that defendant ever received any consideration in stock or otherwise for this last conveyance. If it were argued, as it is not, that *Paul* as a trustee ought to be held only for what he in fact received for plaintiff's interest in these lands, but also for their full value, we are convinced that the evidence fully established that their value did not exceed, if it equaled, the amount received by *Paul* in stock as hereinafter computed.

Starting, then, with the conclusion of fact that there was issued by the corporation and received by *Mr. Paul* and his associates stock of the corporation amounting at par to 148.9 per cent. of the amount which had been invested in these A lands at the time of the organization of the corporation, the question arises what amount is so shown to have been invested. The referee adopted the exact amount paid by *Paul* to and through *Gates* upon the purchase of these lands, but this, obviously, was not all; for in another finding it is established that he had paid taxes to the amount of $3,212.10 and other expenses to the amount of $653. There is considerable probability that some other payments were made, but we are unable to assert that fact from the evidence with sufficient clearness to override these findings, with which neither party finds any fault. These expenditures were just as much contributions by *Mr. Paul* and his associates and just as much entered into the $234,000 which the referee found they had contributed to the pool before organizing the corporation as the $57,200 paid as consideration for the deed; hence there is no question but that, upon the referee's theory, there was issued

stock in the above-stated proportion for this amount of money; hence the true amount of stock issued for these lands was 148.9 per cent. of $61,065.10, namely, 909.26 shares. But this is all that was so issued. The entire lands were conveyed to the corporation and no compensation by reason thereof given except upon this basis. Hence the plaintiff's right is to one sixth that amount instead of one fifth as the referee made his computation, based upon the further argument that, if five sixths were worth $57,200, one sixth must have been worth one fifth of that amount. This, however, was not the test, but, as already stated, the sole question was what amount was in fact issued and received by reason of the transfer to the corporation of one sixth of the A lands. That amount, upon the basis we have just stated, is 151.54 shares. The judgment should be modified by substituting this quantity for the 337.85 shares therein directed to be transferred to plaintiff.

By the Court.—The judgment is modified by substituting for the words and figures "three hundred thirty-seven and eighty-five one-hundredths (337.85) shares" the words and figures "one hundred fifty-one and fifty-four one-hundredths (151.54) shares," and, as so amended, is affirmed, with costs in favor of appellant.

IN RE EASTERN WISCONSIN RAILWAY AND LIGHT COMPANY.

March 1—March 20, 1906.

Eminent domain: Railroads: Crossing of other railroads: Necessity: Manner of crossing: Appeal: Questions reviewed.

1. Under subd. 6, sec. 1828, Stats. 1898 (conferring in express terms upon any railroad corporation the power to cross, intersect, join, and unite its railroad with any railroad theretofore or thereafter constructed, and providing that every corporation

whose railroad is or shall be thereafter intersected by any new railroad shall unite with the owners of such new railroad, and if the two corporations cannot agree upon the amount of compensation and points of crossing, the same shall be ascertained by commissioners), no specific act is enjoined upon the company seeking to cross, and hence the lapse of over one month after a written proposition by petitioner offering to make due and just compensation, and a request for uniting in forming an intersection crossing, justify a finding that the parties were unable to agree.

2. The proceeding under subd. 6, sec. 1828, Stats. 1898, is not a proceeding for the condemnation of land for the construction of a railroad, but a proceeding to effect a crossing or intersection, and the question of necessity in such proceeding has already been determined by the legislature, and is not one for determination by the court on the application for appointment of commissioners.

3. Under subd. 6, sec. 1828, Stats. 1898, the petitioner is entitled to the appointment of commissioners to determine the question of a crossing on the route proposed, and whether some other crossing, track, or means had been offered to the petitioner, whether available or not, is immaterial.

4. In such case, under ch. 497, Laws of 1905, the manner in which grade or other crossings are to be made is to be determined by the commissioners when appointed, with right to appeal to the circuit court from their award; and hence, on an appeal from an order appointing the commissioners, the question of the kind of crossing is not before the court.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The appellant is an electric railway company operating a street railway from a point near Electric Park in the town of Black Wolf, Winnebago county, Wisconsin, about one and one-half miles south of the city limits of the city of Oshkosh, thence northerly to the city of Oshkosh, through said city and Winnebago county to the city of Neenah. Respondent is a railroad corporation, and as such is operating an electric interurban railway between the cities of Fond du Lac and Oshkosh. Prior to September 30, 1903, the Fond du Lac & Oshkosh Electric Railway Company was duly organized, and

owned and operated an interurban electric road from Fond du Lac to a point between 1,200 and 1,300 feet westerly from the south terminus of appellant's line near Electric Park, and on February 17, 1902, entered into a contract with the appellant to connect with its road and run over its tracks into the city of Oshkosh, which tracks of appellant from Electric Park are along the easterly side of the public highway known as the Lake Shore road in the towns of Black Wolf and Algoma, which highway crosses the track of the Chicago & Northwestern Railway in the town of Algoma at what is known as the Doty-street crossing, thence continuing northward to the city of Oshkosh on Doty street as far as Eighteenth, on Eighteenth westerly to Oregon, on Oregon northerly to Ninth, on Ninth easterly to South Main. Under said contract the appellant agreed that it would carry the cars of the Fond du Lac & Oshkosh Electric Railway Company upon its tracks over the streets above mentioned, and the contract provided that the appellant should not, during the term of the contract, furnish power or trackage over its tracks to any other party or parties operating, or desiring to operate, a railroad into the city of Oshkosh from the south covering certain territory, without first obtaining the written consent of the Fond du Lac & Oshkosh Electric Railway Company, and that it would not, either itself or by its agents, operate or build a railroad south of the then terminus of its tracks without the consent of the said Fond du Lac & Oshkosh Electric Railway Company, and that said Fond du Lac & Oshkosh Electric Railway Company should not, during the term of the contract, build any track into the city of Oshkosh without obtaining the consent of the appellant; and further provided that the Fond du Lac & Oshkosh Electric Railway Company should not carry local passengers from any point on the tracks of the appellant to other points on said tracks, and that it was the intention of the contract that the Fond du Lac & Oshkosh Electric Railway Company should not interfere with the es-

tablished business of the appellant upon the tracks of its own system. The contract further provided that it should be in full force and effect during the term of the franchises of the appellant. A supplemental agreement was afterwards made between said companies on February 24, 1903, containing the following provisions:

"First. The party of the first part shall permit second party to carry local passengers from points on its tracks, named in said contract of February 17, 1902, south of said crossing, and deliver them at any point between said crossing, and High street in said city of Oshkosh, named in said contract of February 17, 1902, and to carry local passengers from points on its tracks in the city of Oshkosh, named in said contract of February 17, 1902, and deliver them at any point south of the said crossing on said track of first party during such times only as first party shall not furnish service south of said crossing.

"Second. The second party shall pay to first party two and one-half cents for each and every passenger carried under the terms of this agreement and ten per cent. of the gross receipts for any service other than the carrying of passengers.

"Third. It is mutually agreed and understood that second party is not to carry passengers between the points herein named when first party is furnishing service between said points.

"Fourth. This agreement may be canceled at any time by either party upon giving the other party ten days' notice of its cancellation."

Afterwards the petitioner was duly incorporated and succeeded to all the rights and privileges of said Fond du Lac & Oshkosh Electric Railway Company, and thereafter continued to run its cars over the tracks of the appellant into the city of Oshkosh. In 1905 the board of directors of the petitioner, by resolution duly passed, located the route of its road over a more direct route from the point 1,200 or 1,300 feet westerly from appellant's line near Electric Park, thence northerly to a point of crossing with the tracks of the appellant in section 36, town of Algoma, thence across the tracks of said

appellant and the Chicago & Northwestern Railway so as to connect with its own track then laid in South Main street in the city of Oshkosh. The appellant having failed to unite with the petitioner in an agreement to form intersections and grant facilities for crossing, the petitioner filed its petition for the appointment of commissioners to ascertain the points and manner of crossing, connections, and the amount of compensation to be made therefor by petitioner to appellant. The petition contained the usual allegations in such cases, and the court gave notice of hearing, whereupon the appellant appeared and answered denying the petitioner's right to the appointment of commissioners. The case was heard upon the petition and answer, and the court found that no sufficient cause was shown against the granting of the prayer of the petition, and that it satisfactorily appeared that the parties could not agree as to the points and manner of crossing and connections and the place at and manner in which such crossing should be made, and the amount of compensation to be made therefor by petitioner to the appellant, and ordered and determined that for the purpose of constructing, completing, and operating its road it was necessary for petitioner to form an intersection and crossing with the road of the appellant, where the route of the petitioner's road, as laid out and surveyed, crossed the road of the appellant, and that the points and manner of such crossing, the place at and manner in which the crossing should be made, and the compensation to be made therefor be determined by commissioners; and further ordered that petitioner was entitled to the appointment of commissioners, as by statute in such case made and provided, to ascertain the points, manner of crossing, connections, place at and manner in which such crossing should be made, and the amount of compensation to be made therefor by petitioner to appellant, and appointed three commissioners accordingly. Exceptions were duly made to this order, and an appeal taken therefrom to this court.

For the appellant there were briefs by *Weed & Hollister,* attorneys, and *Charles Barber,* of counsel, and oral argument by *Mr. H. I. Weed* and *Mr. Barber.*

For the respondent there was a brief by *Bouck & Hilton,* attorneys, and a separate brief signed also by *Thompson, Thompson & Pinkerton,* and oral argument by *John F. Kluwin* and *Charles Quarles.*

KERWIN, J. It is undisputed that at the time of the commencement of this proceeding the petitioner was a railroad duly incorporated according to law, and authorized to carry freight and passengers over its road between the cities of Fond du Lac and Oshkosh, and was duly authorized to construct, operate, and maintain an electric interurban railroad between said cities, and avail itself of all the rights and privileges conferred by subd. 6, sec. 1828, Stats. 1898, and ch. 497, Laws of 1905. But it is strenuously maintained on the part of the appellant that the petitioner was not entitled to the appointment of commissioners in the instant proceeding, for the reasons: (1) That it had not shown a failure to agree with the appellant as to amount of compensation to be made or the points and manner of crossing; and (2) that no necessity had been shown for the crossing in question.

1. Subd. 6, sec. 1828, Stats. 1898, respecting railroad crossings, provides that a railroad corporation shall have power "to cross, intersect, join and unite its railroad with any railroad heretofore or hereafter constructed, at any point on its route and upon the grounds of such railroad corporation. . . . And every corporation whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor or the points and manner of such crossings and connections the same shall be ascertained by

commissioners to be appointed by the court, as is provided in this chapter in respect to acquiring title to real estate." And ch. 497, Laws of 1905, makes all the provisions of the above subdivision apply to street and electric railways, and provides in effect that the commissioners shall have power to determine the place at and manner in which grade or other crossings shall be made, and, on an appeal from the determination and award to the circuit court, such court shall have power to review, revise, modify, or affirm such award both as to the amount of compensation and the manner of making such crossing, and may make such reasonable provisions as it shall deem necessary for public safety.

It will be seen from the foregoing that no specific act is enjoined by the terms of the statute upon the company seeking to cross. It in express terms confers the power to cross, intersect, join, etc., and provides that "every corporation whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad, . . . and if the two corporations cannot agree upon the amount of compensation" and points of crossing, the same shall be ascertained by commissioners. Clearly, from the express language of the statute, no specific duty is imposed upon the company seeking the crossing respecting an effort to agree other than is imposed upon the old company. No act is required to be done and no positive duty in that regard enjoined. The duty imposed must rest alike upon both parties. This is clear from the provisions of the statute. It seems to be conceded by petitioner's counsel that the statute contemplates that the two companies should make an effort to agree. The failure to agree is all that is necessary to allege in the petition. This fact was alleged and found by the court. Assuming the statute contemplates that both companies shall make an effort to agree we think it has been clearly shown that petitioner did all it was required to do. Negotiations were in progress between the representatives of the companies

respecting the matter from September until December, and a written notice served by petitioner about a month before the filing of the petition offering to make due and just compensation, and demanding that the appellant unite with the petitioner in forming an intersection and crossing, specifying the kind, place, and manner of the crossing desired, and before this notice was served several unsuccessful attempts had been made to agree. No claim is made by the appellant that the two companies could or did ever agree. The main controversy in the court below was that there was no necessity for the crossing. It is contended by counsel for appellant that no offer of any amount was ever made as compensation; but clearly this was unnecessary, under the statute, upon any theory. When the demand was made to agree and pay just compensation, it was the duty of the appellant to meet the petitioner upon its proposition and endeavor in good faith to agree. The written proposition of petitioner, and the lapse of nearly a month without any response from appellant, was sufficient to justify the finding that the parties were unable to agree. 2 Lewis, Em. Dom. § 302. Without pursuing the subject further, we are satisfied that there was a *bona fide* attempt on the part of the petitioner to agree, and that the finding of the court below on that question is fully supported by the evidence.

2. The necessity for the crossing was determined by the legislature. It was neither delegated to the court nor to the commissioners. The statute above referred to expressly empowers the new road to cross the tracks of the old, but leaves to the commissioners in the first instance the right to determine the points and manner of crossings and connections and the compensation to be made. As we understand counsel's argument, they contend that the necessity for the crossing is to be determined by the court, and rely upon cases decided under the condemnation statutes, where the power to deter-

mine the necessity is delegated by the legislature to the court. But it is very clear that these statutes contemplate two classes of cases, and the decisions bear out that construction; one where the power to take is expressly given, and the other where the necessity to take is left for the determination of the court. In the former the court has nothing to do with determining the necessity; that is done by the legislature. *Wis. C. R. Co. v. Cornell University,* 52 Wis. 537, 8 N. W. 491; *Wis. C. Co. v. Kneale,* 79 Wis. 89, 48 N. W. 248; *In re Lockport & B. R. Co.* 77 N. Y. 557. The Wisconsin cases above cited do not construe the particular statute in question here, but make clear the distinction between cases where the determination of the necessity is delegated to the courts and cases where it is determined by the legislature. Moreover, the proceeding under subd. 6, sec. 1828, Stats. 1898, above cited, is not a proceeding for the condemnation of land for the construction of a railroad, but is simply a proceeding to effect a crossing or intersection, and the question of necessity in such proceeding is not one for determination by the court on the application for appointment of commissioners. *In re Lockport & B. R. Co., supra.* A careful examination of the two cases mainly relied upon by counsel for appellant (*In re St. Paul & N. P. R. Co.* 37 Minn. 164, 33 N. W. 701, and *Seattle & M. R. Co. v. State,* 7 Wash. 150, 34 Pac. 551) and the statutes of these states upon the subject convinces us that they are not controlling here. The Minnesota supreme court, in *State ex rel. St. Paul, M. & M. R. Co. v. District Court,* 35 Minn. 461, 29 N. W. 60, construed the statute as follows:

"The district court is called upon to do three things: (1) Determine the necessity of the crossing; (2) prescribe where and how it shall be made; and (3) appoint commissioners."

Clearly this is not the construction which our crossing statute should receive. The authority to cross is plainly dele-

gated to the railroad by the legislature, hence the determination of the necessity is not for the court on special proceeding for the appointment of commissioners. The Washington statute is essentially different from ours, as will be seen from the following quotation therefrom:

"And if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the taking of lands and other property which shall be necessary for the construction of its road."

While, from the view we take of the case, it was wholly unnecessary for the lower court to determine the necessity to make the crossing, it did so determine, and its finding upon this point is fully supported by the evidence. The record shows that the petitioner could not enter the city of Oshkosh over its proposed route without crossing the tracks of the appellant. The offer to permit the petitioner to use certain portions of its track in entering the city, or the alleged contract relations, need not be considered, since they are no defense to this proceeding. The petitioner was entitled to the appointment of commissioners to determine the question of a crossing on the route proposed, under the provisions of the statute, and whether some other crossing, track, or means of entrance were offered by the appellant, whether available or not, was wholly immaterial. The petitioner had the right to construct and operate its road under its franchises in the manner provided by law over the route selected by its board of directors, and it owed a duty to the public to do so, which it could not abandon at pleasure.

The parties having failed to agree, and the petitioner being entitled as matter of right under the statute to the appointment of commissioners, the other questions discussed by counsel become immaterial and unnecessary to consider on this appeal. Whether petitioner was entitled to a grade crossing is

not before us. Ch. 497, Laws of 1905, hereinbefore referred to, provides:

"The commissioners therein named shall have power to determine the place at and manner in which grade or other crossings shall be made, and on an appeal from the determination and award of such commissioners to the circuit court as provided by this chapter, in condemnation proceedings, such court shall have power to review, revise, modify, or affirm such award, both as to the amount of compensation therein provided, and as to the manner of making such crossing, and may make such reasonable provisions as it shall deem necessary for public safety."

It will be seen that on appeal from the determination and award to the circuit court a review may be had. It follows that the order below should be affirmed.

By the Court.—The order appealed from is affirmed.

DISCONTO GESELLSCHAFT, Respondent, vs. UMBREIT, Intervener, Appellant.

SAME, Respondent, vs. SAME, imp., Appellant.

October 5, 1905—April 17, 1906.

Aliens: Right to maintain actions: Comity: Garnishment: Lien: Negotiable instruments: Certificate of deposit: Judgments: Publication of summons: Jurisdiction: Equity.

1. Aliens who are *sui juris* and not specially disabled by the law of the place where action is brought may there maintain suits to vindicate their rights and redress their wrongs.
2. Plaintiff, a resident and citizen of Germany, occupied nominally the character of a creditor, but really was the mere agent of a foreign trustee of a debtor's estate appointed in involuntary bankruptcy proceedings, to whom plaintiff had agreed to hand over all it might recover. Plaintiff had no property in Wiscon-

sin, or contract within or with a resident of that state, and brought action in a court of that state against a nonresident alien, temporarily within the state, to recover on a transitory cause of action arising without the state, and by the process of garnishment sought to impound property of the debtor within this state to satisfy its judgment therefrom. U., another creditor of the debtor, was a resident and citizen of Wisconsin, and had secured by garnishment a lien on the same property, but his proceedings were subsequent in point of time to those initiated by the alien creditor. The domestic creditor, having obtained judgment, thereafter intervened in the action brought by the alien. On appeal from a judgment in favor of the alien, *held:*

(1) The main action could not be maintained by the alien as a matter of right, but only on the principles of comity.

(2) The auxiliary action of garnishment by the alien was governed by the same principles that applied to its main action, notwithstanding the fact that residents and citizens of Wisconsin were parties to the auxiliary action as stakeholders or claimants of impounded property.

(3) Comity does not allow an alien creditor to seize and carry away property within the jurisdiction of Wisconsin courts when a resident creditor stands also at the bar of the same court with a judgment and provisional lien, and thus force such resident creditor to go to a foreign court to collect his debt.

(4) It makes no difference that the home creditor's claim may have accrued after that of the alien; the question is not to be determined by priority in point of time, but by the situation at the time the court is called upon to finally decide which creditor shall receive its aid.

(5) To allow the alien creditor, really the mere agent of a foreign trustee in bankruptcy, to recover would overrule the policy of the state that a foreign trustee or receiver in involuntary bankruptcy proceedings can obtain no title to the debtor's property in Wisconsin.

3. The rule that a resident of another state may sue another nonresident on a transitory cause of action arising out of Wisconsin, in the Wisconsin courts, as a matter of strict right, is based solely upon the provisions of sec. 2, art. IV, Const. of U. S. (declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states), and does not apply to nonresident aliens.

4. By the rules of comity, the courts of one state will voluntarily enforce the laws of a friendly state or nation when, by such

enforcement, they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens.

5. Under subd. 1, sec. 2769, Stats. 1898, no lien is obtained by an attempted garnishment where the fund is represented by a certificate of deposit.

6. In an equitable action to determine the rights of two creditors to a fund, it appeared, among other things, that one creditor was a nonresident alien whose cause of action arose in Germany, and that it had agreed to turn over all it realized thereon to a trustee of the debtor's estate, appointed in involuntary bankruptcy proceedings had in Germany, and that the other creditor, U., had reduced his claim to judgment, obtained by default upon substituted service of the summons, for the full amount demanded in his complaint and had garnished the fund in question, which consisted of a certificate of deposit issued by a bank. On the trial of such equitable action the court gave judgment in favor of the alien creditor, but made no finding as to the merits of U.'s claim, or that it was named or described in the papers upon which the order of publication was based, and there was no bill of exceptions returned with the record on the appeal from the judgment entered in the equitable action. *Held*, that a mere finding that a judgment was obtained by U. by default upon substituted service was insufficient to authorize the appellate court to hold that any jurisdiction was obtained of the debt due from the bank, since it did not appear affirmatively, from such findings, that the property was described in the complaint, or in the affidavit on which the order of publication was based.

7. In such case the judgment was reversed for the purpose of allowing U. to introduce proof showing that the debt due from the bank was described in the affidavit or in the complaint, in which event judgment was directed in his favor; but in case such was not the fact, it was directed that U. be allowed to introduce extrinsic evidence of the amount justly and equitably due him, which the alien creditor was to be allowed to meet, and the amount found to be justly due U. was directed to be given the preference over the alien creditor's claim.

8. Treaties between the United States and the Kingdom of Prussia dated in 1799 and 1828, referred to in the opinion, are considered to have no bearing on the controversy raised in this action.

9. CASSODAY, C. J., dissenting, is of the opinion that by its garnishment proceedings the alien creditor obtained an equitable lien which should be preferred over that of the resident creditor.

APPEALS from judgments of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The two actions above named, the first by way of garnishment and the second by way of creditors' bill to reach nonleviable assets, were consolidated for the purposes of trial, and from a judgment in favor of the plaintiff in each action the defendant *Umbreit* appeals. The facts in the cases were not in dispute, and were substantially as follows: The plaintiff is a banking corporation of the German Empire, having its principal banking house at Berlin. Gerhard Terlinden, the defendant in the main action, was and is a subject of the German Empire. In July, 1901, Terlinden absconded from Germany to this country, and was arrested at Milwaukee, August 16, 1901, as a fugitive from justice in extradition proceedings, which proceedings afterwards resulted in his being extradited to Germany. In May, 1901, Terlinden had committed torts in Germany, by which the plaintiff bank had sustained damages amounting to nearly $100,000, and on August 17, 1901, the plaintiff commenced an action by personal service of a summons upon Terlinden in the Milwaukee circuit court to recover its damages for said torts, and at the same time garnished the First National Bank and the Marine National Bank of said city. The First National Bank answered, admitting the previous deposit by Terlinden of two sums aggregating $6,420. The Marine National Bank answered, admitting the previous deposit by him of $5,000, for which it had issued to him a negotiable certificate of deposit in the usual form, which had not been returned. February 19, 1904, the plaintiff recovered judgment in the main action against Terlinden for $94,105.11. The appellant *Umbreit* is, and was at all times named, a citizen and resident of Wisconsin, and rendered services for Terlinden beginning August 16, 1901, and ending February 1, 1903, and, on March

21, 1904, commenced an action against Terlinden to recover for such services, in which action he obtained service by publication only. At the time of the commencement of such action he also garnished the defendants First National Bank and Marine National Bank. *Umbreit* obtained judgment against Terlinden in his main action by default on June 11, 1904, for $7,500 damages; thereupon he intervened in the plaintiff's garnishee action against the First National Bank, and claimed that his lien by garnishment was superior to that of the plaintiff. April 1, 1904, the plaintiff brought an action in equity in the nature of a creditors' bill against Terlinden, the Marine National Bank, John C. Ames, and *Umbreit,* the object of the action being to aid its lien by garnishment against the Marine Bank, and it demanded judgment that the $5,000 certificate of deposit, which was in the possession of the defendant Ames, not indorsed, be subjected to the lien of its judgment against Terlinden, and that the claims of *Umbreit* and the other defendants be cut off. In this action a temporary injunction, preventing the transfer or payment of the certificate of deposit, was issued and served upon the defendants. The defendant Ames surrendered the certificate into court and disclaimed title thereto; the defendant *Umbreit* answered, setting up his own judgment and garnishment, and claiming that his lien thereby was superior to that of the plaintiff. On or about July 27, 1901, proceedings in bankruptcy were instituted in Germany against Terlinden, and one Hecking was appointed trustee of the estate. On or about August 20, 1901, the plaintiff presented its claim to said trustee in bankruptcy, being the same claim upon which the main action was brought. The main action was commenced with the approval of the trustee, Hecking, and after its commencement the plaintiff agreed with Hecking that all moneys he should recover in the action should form part of the estate in bankruptcy and be handed over to trustee Heck-

ing. It appears that the German bankruptcy act contains the following provision (sec. 14):

"Pending the bankruptcy proceeding neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors."

The garnishment action against the First National Bank and the bill in equity against the Marine National Bank were thereupon consolidated and tried together, and the court, upon the above facts, awarded the money in both banks to the plaintiff.

For the appellant there were briefs by *August C. Umbreit, in propria persona, Joseph B. Doe,* attorney, and *Hoyt, Doe, Umbreit & Olwell,* of counsel, and oral argument by *Mr. Umbreit* and *Mr. Doe.* They contended, *inter alia,* that domestic creditors will be protected to the extent of not allowing property or the funds of a nonresident debtor to be withdrawn from the state before such domestic creditors have been paid. Every country will first protect its own citizens. *Woodward v. Brooks,* 128 Ill. 222; *Chicago, M. & St. P. R. Co. v. Keokuk N. P. Co.* 108 Ill. 317; *Catlin v. Wilcox Silver-Plate Co.* 123 Ind. 477; *Chafee v. Fourth Nat. Bank,* 71 Me. 514, 524; *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. St. 291; *Lycoming F. Ins. Co. v. Wright,* 55 Vt. 526; *Thurston v. Rosenfeld,* 42 Mo. 474; *Willitts v. Waite,* 25 N. Y. 577. Citizens and residents of a country where insolvency proceedings have been instituted are bound by such proceedings and cannot pursue the property of an insolvent debtor in another country. *Cole v. Cunningham,* 133 U. S. 107; *Linville v. Hadden,* 88 Md. 594; *Chafee v. Fourth Nat. Bank,* 71 Me. 314; *Einer v. Beste,* 32 Mo. 240; *Long v. Girdwood,* 150 Pa. St. 413; *Bacon v. Horne,* 123 Pa. St. 452. A creditor, by proving his claim in bankruptcy or insolvency proceedings, submits to the jurisdiction of the court in which the proceeding is pending and cannot pursue his remedy elsewhere. *Cooke v. Coyle,* 113 Mass. 252; *Ormsby v. Dearborn,* 116 Mass. 386; *Batchelder*

v. Batchelder, 66 N. H. 31; *Wilson v. Capuro,* 41 Cal. 545; *Wood v. Hazen,* 10 Hun, 362; *Clay v. Smith,* 3 Pet. 411. Where both parties, plaintiff and defendant, are residents of a foreign state, a plaintiff cannot come into this state and obtain an advantage by our law which he could not obtain by his own. If he seeks to nullify the law of his own state and asks the court to aid him in so doing, he cannot have such assistance, if for no other reason than that it is forbidden by public policy and the comity which exists between states and nations, which comity will always be enforced when it does not conflict with the rights of domestic citizens. *Bacon v. Horne,* 123 Pa. St. 452; *In re Waite,* 99 N. Y. 433; *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. St. 291. Citizens of a foreign state or country will not be aided by the courts of this state to obtain by garnishment a preference of their claim against a foreign debtor, in disregard of proceedings in their own country for the sequestration of a debtor's estate and the appointment of a trustee thereof in bankruptcy. *Long v. Girdwood,* 150 Pa. St. 413. It is the uniform rule and doctrine of all courts that the principles of comity do not require that the courts confer powers upon a foreign receiver or trustee in bankruptcy, or permit him to bring and maintain actions in this state that interfere with and impair the rights of domestic creditors. *Humphreys v. Hopkins,* 81 Cal. 551; *Ward v. Pacific Mut. L. Ins. Co.* 135 Cal. 235; *Hunt v. Columbian Ins. Co.* 55 Me. 290; *Pierce v. O'Brien,* 129 Mass. 314; *Rogers v. Riley,* 80 Fed. 759; *Catlin v. Wilcox Silver-Plate Co.* 123 Ind. 477.

For the respondent there were briefs by *Winkler, Flanders, Smith, Bottum & Fawsett,* and oral argument by *F. C. Winkler.*

WINSLOW, J. The general question here presented is whether a nonresident and alien creditor may sue a nonresident and alien debtor in the courts of this state upon a cause

of action accruing in a foreign country, and may by means of garnishment or other provisional remedy impound property of the debtor within the state, and obtain judgment permitting it to apply such property upon the debt when one of our own citizens is shown also to be a creditor of the alien debtor and to have taken subsequent legal proceedings to impound the property for the payment of his claim. The general rule that all foreigners *sui juris* who are not specially disabled by the law of the place where the suit is brought may there maintain suits to vindicate their rights and redress their wrongs is undoubted. Story, Conflict of Laws (8th ed.) § 565; 2 Cyc. 107, 108, art. "Aliens." Resident alien friends are said to have practically the same rights and privileges, so far as the protection by law of their persons, liberty, reputation, and property rights is concerned, as citizens; and to protect these rights they must possess the legal remedies necessary for their due vindication. Alien friends, whether resident or nonresident, also have, in the absence of disabling statutes at least, the right to take, hold, enjoy, and dispose of property, real and personal, and to make contracts with residents, and so must have the right to invoke legal remedies to maintain these rights. In both cases the remedies are commensurate with the rights to be protected.

The plaintiff, however, is within neither of these principles. It is a nonresident, it has no property of any kind within the state, it has made no contract within the state or with any resident of the state. It has brought action against another nonresident alien, temporarily within the state, to redress a wrong committed without the state, and it asks the courts of this state not only to give it judgment for that wrong, but also to lend the aid of its process to impound property within the state and satisfy such judgment therefrom to the prejudice of one of the state's own citizens who has a claim against the same debtor. It is true that the cause of action is transitory and the parties both within the jurisdic-

tion of the court, and so the court has jurisdiction, and may doubtless rightly entertain the cause; but is the court compelled to do so, because of an inherent right which the alien has to demand the action of the court; or does it do so upon the principles of comity, with the right to refuse relief when such relief prejudices the interests of resident citizens? This is the initial question in the case, and the one upon which, as it seems to us, it must turn. In considering this question there should be no confusion of ideas as to the exact situation and relation of the various actions and proceedings. It must be kept in mind that the original action is between two nonresident aliens upon a foreign cause of action; the appeals in the present cases are from judgment in two auxiliary actions brought in aid of the main action, to impound property, which actions are, in effect, only proceedings to secure payment of the judgment in the main action by equitable execution upon nonleviable property. Had the property sought to be reached been tangible and leviable in its nature, writs of attachment and execution issued in the main action would have accomplished the same purpose. It is manifest, therefore, that if the main action cannot be maintained as matter of right, but only (if at all) on the principles of comity, the auxiliary actions or equitable proceedings in the nature of attachment and execution must fall under the same rule which applies to the main action out of which they spring, notwithstanding the fact that residents of the state may be parties to the auxiliary actions as stakeholders or claimants of the impounded property. That the main action is not an action maintainable as a matter of right, but only upon the principles of comity, seems unquestionable.

This court has held that a resident of another state may sue another nonresident upon a transitory cause of action arising outside of this state, in our courts, as a matter of strict right. *Eingartner v. Illinois S. Co.* 94 Wis. 70, 68 N. W. 664. This ruling was, however, based solely upon

that provision of the constitution of the United States which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Sec. 2, art. IV, Const. of U. S. It will be noticed that the present chief justice, though concurring in the result, disagreed with the court in that case upon this question, and took the position that the action could not be maintained, as matter of right, even under the constitutional provision named, but only upon the principles of comity. It is very manifest that, had the case been one between alien nonresidents, to whom the constitutional provision does not apply, the court would have taken the same view. It is not intended, however, to base the decision of this case upon a mere inference of this nature, nor is it necessary. The principle that an action between nonresident aliens upon a cause of action arising in a foreign country is entertained or not in the courts of this country as the principles of comity may dictate is very well supported. It is said by Mr. Wheaton in his Elements of International Law (8th ed., edited by R. H. Dana) pt. 2, § 140:

"It is the duty as well as the right of every nation to administer justice to its own citizens; but there is no uniform and constant practice of nations as to taking cognizance of controversies between foreigners. It may be assumed or declined at the discretion of each state, guided by such motives as may influence its judicial policy."

Mr. Webster, in his argument in the case of *Bank of U. S. v. Primrose,* defined the doctrine of comity as follows:

"It is, in general terms, that there are, between nations at peace with one another, rights, both national and individual, resulting from the comity or courtesy due from one friendly nation to another. Among these is the right to sue in their courts, respectively." 6 Webster, Works, 117.

The principle is impliedly recognized in *Mason v. Ship Blaireau,* 2 Cranch, 240. This was a libel for salvage upon a French vessel which had been damaged in a collision on the high seas and brought into an American port by a crew put

on her by an English vessel. All the parties were foreigners, and a question as to the jurisdiction of the court was raised, and thus treated by Chief Justice MARSHALL (p. 264):

"These doubts [*i. e.* doubts as to the jurisdiction] seem rather founded on the idea that upon the principles of general policy this court ought not to take cognizance of a case arising entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court that whatever doubts may exist in a case where the jurisdiction is objected to, there ought to be none where the parties assent to it."

It is very manifest that the case was entertained and decided not because the alien parties had a right to demand it, but because considerations of public convenience seemed in that case to require it. Had considerations of public policy, convenience, or the protection of the interests of our own citizens been upon the other side of the question, it seems evident that the court would have refused to exercise its jurisdiction. This is really the principle of comity. It is a question of discretion in the exercise of power, not a question of the existence of the power itself, for that is admitted.

In an early case in New York it was said that while our courts may take cognizance of torts committed on the high seas on board a foreign vessel where both parties are foreigners, still "it must, on principles of policy, often rest in the sound discretion of the court to afford jurisdiction or not according to the circumstances of the case. To say that it can be claimed in all cases, as matter of right, would introduce a principle which might oftentimes be attended with manifest disadvantage and serious injury to our citizens abroad as well as to foreigners here." *Gardner v. Thomas,* 14 Johns. 134. This doctrine was approved in *Johnson v. Dalton,* 1 Cow. 543; *Dewitt v. Buchanan,* 54 Barb. 31; *Olzen v. Schierenberg,* 3 Daly, 100; and the doctrine was also held in that

state to apply to actions between nonresident citizens of other states (*Burdick v. Freeman,* 120 N. Y. 421, 24 N. E. 949), which, as we have seen, is contrary to the rule in this state as declared in the *Eingartner Case, supra.* The same rule as to foreigners is held in Michigan (*Great Western R. Co. v. Miller,* 19 Mich. 305), where it was said that "where the parties are not residents of the United States and the trespass was committed abroad, the right of action in our courts can only be claimed as a matter of comity, and they are not compellable to proceed in such cases." See, also, 7 Am. Law Rev. 417, art. "Suits Between Aliens." The doctrine is reasonable; in fact, any other doctrine would seem to be an anomaly. The laws of a state are enacted primarily for the regulation, benefit, and protection of persons, rights, and property within its jurisdiction. To hold that two foreigners may import, bodily, a cause of action, and insist, as a matter of right, that taxpayers, citizens, and residents shall await the lagging steps of justice in the ante-room while the court hears and decides the foreign controversy, seems, on the face of it, to be unreasonable, if not absurd.

Holding, therefore, that the main action in the present case, with its equitable auxiliary proceedings to impound nonleviable property, is to be maintained in the courts of this state (if at all) upon the ground of comity rather than upon the ground of right, we are to inquire what the general principles of comity are, and what circumstances in the present case are to be considered in deciding whether the courts of this state should extend their aid to the plaintiff. Comity is defined as: "Courtesy; a disposition to accommodate." By the rules of comity between nations, the courts of one state will voluntarily enforce the laws of a friendly state or nation when, by such enforcement, they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens. While this court has not had occasion to consider the application of the principles

of comity to an action between nonresident aliens upon a cause of action accruing abroad, like the present, it has passed upon cases involving other phases of the question, and has clearly recognized the principle and its limitations. Thus, in *Mowry v. Crocker,* 6 Wis. 326, this court held that a voluntary assignment of property for the benefit of creditors made in another state passes the title to personal property of the assignor within this state, and will be given full effect by the courts of this state; and this ruling was followed in *Cook v. Van Horn,* 81 Wis. 291, 50 N. W. 893, and recognized in *Segnitz v. Garden City B. & T. Co.* 107 Wis. 171, 83 N. W. 327, as well as in *Gilman v. Ketcham,* 84 Wis. 60, 54 N. W. 395. But in *McClure v. Campbell,* 71 Wis. 350, 37 N. W. 343, it was held that an assignment of property made in another state pursuant to a law which amounts to a state bankrupt law has no extraterritorial effect, and will not be given effect by the courts of this state as to property within this state, and this doctrine has been subsequently approvingly cited in *Filkins v. Nunnemacher,* 81 Wis. 91, 51 N. W. 79; *Wells, Fargo & Co. v. Walsh,* 87 Wis. 67, 57 N. W. 969; *Hughes v. Hunner,* 91 Wis. 116, 64 N. W. 887; and *Segnitz v. Garden City B. & T. Co., supra.* The vital distinction between the two principles is that in the first case the title to the property passes by act of the owner, which is effective as to personal property wherever situate, while in the second case the assignment is either actually or practically made by decree of the court or operation of law in proceedings *in invitum,* and hence it has no effect outside of the jurisdiction of the court. See, also, *Smith v. C. & N. W. R. Co.* 23 Wis. 267. It is well to note, however, that even in the first line of cases, where effect is given to the assignment in this state, the ruling is distinctly based upon the principle of interstate comity, though the principle was not discussed at any length in any of the cases.

In *Gilman v. Ketcham,* 84 Wis. 60, 54 N. W. 395, the

subject received attention in an opinion written by the late Mr. Justice PINNEY, which is valuable and instructive. In this case it appeared that a New York manufacturing corporation had commenced proceedings in the courts of that state for its own voluntary dissolution, and had been adjudged insolvent and dissolved, and all its property, effects, and credits transferred to the defendant Ketcham as receiver; that in course of the proceedings an order had been made enjoining all creditors of the corporation from commencing or prosecuting any actions against the corporation to collect their debts, which order had been served upon Gilman, who resided in New York; that the New York statute under which the proceedings were brought did not contemplate or provide for a discharge of the debtor, but simply for division of its property among its creditors and stockholders; that, after the injunctional order aforesaid had been made and served, Gilman commenced action in this state against the corporation, and garnished one of its debtors in this state, who brought the money into court, and Ketcham was thereupon interpleaded and made claim to the fund, by reason of the facts above stated. In this case it was held that the effect of the voluntary dissolution proceedings in New York was to place all of the corporate property and assets *in custodia legis,* to be collected and applied by the receiver; that there was nothing in the proceeding or the statutes of New York in contravention with the law or public policy of this state, and that to give effect to such proceedings would not prejudice the rights of any citizen of this state. On these grounds the claim of the receiver was recognized and upheld upon the principles of comity, as against the plaintiff who was seeking the aid of the courts of this state in violation of the law, and evading the process of his own state. In discussing the question it was said:

"Our own citizens, in a proper case, would no doubt be protected against the effect of such extraterritorial act and

adjudication, if injurious to their interests or in conflict with the laws and public policy of Wisconsin, and effect would not be given to it at the expense of injustice to our own citizens."

This was not a chance remark, but a careful statement of the principle of comity as applied to the case before the court, and was thoroughly supported by citations of and quotations from the authorities, which need not be repeated here. This case has since been cited with approval in *Hughes v. Hunner,* 91 Wis. 116, 120, 64 N. W. 887; *Parker v. Stoughton M. Co.* 91 Wis. 174, 180, 64 N. W. 751; *Wyman v. Kimberly-Clark Co.* 93 Wis. 554, 559, 67 N. W. 932; *Finney v. Guy,* 106 Wis. 256, 82 N. W. 595; and by the present chief justice in his concurring opinion in *Eingartner v. Illinois S. Co.* 94 Wis. 70, 84, 68 N. W. 669, where he also says:

"Actions like the one at bar [which was an action by one nonresident against another for a tort committed in Illinois] are generally governed by the principles of interstate comity."

In *Finney v. Guy, supra,* it is said in the opinion of Mr. Justice MARSHALL:

"This court recognizes fully the importance of interstate comity and uniformly freely gives effect to it as regards the laws of sister states when it will not seriously violate the policy of our own laws or the rights of our own citizens. . . . A liberal course in the enforcement of the laws of other states in proper cases should be the rule, but the paramount duty of our judicial system is to safeguard our own state policy and prevent injustice to our own people within reasonable limits." 106 Wis. 276, 277 (82 N. W. 602).

Upon these principles, then, we are to determine whether the plaintiff should be allowed by the courts of this state to take the moneys which it has impounded, and in determining this question a brief reference to the facts at this point will be helpful. Terlinden committed a tort (the nature of which does not appear) against the plaintiff in Germany in May, 1901, and fled to this country, bringing the money in question and depositing it in bank. It appears to have been

his own money; at least there is nothing before us to show to the contrary. The intervener, *Umbreit,* began to render services to Terlinden (the nature of which does not appear) on August 16, 1901, and continued to render services until February 1, 1903, when his bill amounted to $7,500, which has not been paid. The plaintiff commenced suit against Terlinden to recover damages for said tort August 17, 1901, and obtained judgment for more than $94,000 February 19, 1904; more than $85,000 thereof being still unpaid. At the time of commencing suit it garnished the banks. *Umbreit* brought action against Terlinden in March, 1904, and garnished the banks, obtained service by publication, and was given judgment by default in his main action for $7,500 June 11, 1904. Terlinden was thrown into involuntary bankruptcy in Germany July 27, 1901, and the plaintiff has taken part in the proceedings. The German law prohibits the creditor of a bankrupt from seizing the bankrupt's property by attachment or execution pending the bankruptcy proceedings. The plaintiff, after the commencement of its action, agreed with the trustee in bankruptcy that it would hand over all moneys it might recover in the action to the trustee to go into the general estate.

It may be admitted that there is nothing contrary to our laws or public policy in the prosecution of an action by a foreigner against another to recover damages for a tort committed abroad, provided that the legal business of citizens is not materially interfered with thereby. The policy of our laws is to give every man a certain and efficient remedy in the courts for the wrongs which he may suffer. It may be admitted, also, that by the mere prosecution of the action to judgment in the present case no interest of the public nor of any of our citizens was prejudiced. But the plaintiff was not content simply to prosecute his action to judgment. At the inception of his action he asked and obtained the help of the court to seize and hold property of the defendant within

the jurisdiction of the court to answer the demands of its expected judgment. At this very time Terlinden was indebted to *Mr. Umbreit,* a citizen of our own state, in some amount, and evidently upon a contract for continuous service. There is nothing in the record to impeach the *bona fides* of that debt or service. Before the plaintiff obtained any judgment on its claim, *Umbreit's* claim had become large; action was begun upon it in March, 1904, the same property impounded by garnishment, and in June, 1904, judgment was obtained. Thereupon *Umbreit* intervened in the plaintiff's garnishment action, and thus the foreigner and the citizen were brought face to face, each demanding the aid of the court in subjecting the funds in bank to the payment of its claim in preference to the other. If the foreigner was entitled to maintain his action and prosecute all the statutory auxiliary remedies as matter of right, his present claim would have to be sustained, because he obtained the prior lien by garnishment (so far, at least, as the funds in the First National Bank are concerned); but being only entitled to ask the help of the court on the ground of comity he must, necessarily, only take such help as the rules of comity will give. It is confidently believed that no court in such case ever has allowed or should allow the foreigner to seize and carry away property within the jurisdiction when a resident creditor stands also at the bar with his judgment and his provisional lien, and thus force such resident creditor to go to a foreign country to collect his debt. If such action be not prejudicial to the rights and interests of our own citizens, it is difficult to see what action would be prejudicial. Nor does it make any difference that the home creditor's claim may have accrued after that of the foreign creditor; the question is not to be determined by priority in point of time any more than by priority of garnishment, but by the situation at the time when the court is called upon to finally decide which creditor shall receive its aid. So, if the case were devoid of any other facts, comity would require that the interests of the

home creditor be protected. But there are other facts which have a material bearing. The foreign creditor is here nominally in his character as a creditor, but really as the mere agent of the foreign trustee in bankruptcy, who could not himself come here and assert any right to the property. The creditor has agreed to hand over to the trustee for general distribution all that he may recover in this action. Thus it is proposed by the aid of our courts to set at naught the policy of our own law to the effect that a foreign trustee or receiver in involuntary bankruptcy proceedings obtains no title to the debtor's property within this state. This is certainly imposing upon good nature, and comity is, after all, simply good nature. So we reach the conclusion that so far as the case against the First National Bank is concerned, the judgment is erroneous and should have been in favor of the intervener.

As to the equitable action in aid of the garnishment against the Marine National Bank, while the general principles of comity already discussed are equally applicable, there are some further considerations. In this case neither party obtained any lien on the fund by reason of the attempted garnishments, because it was represented only by a negotiable instrument which the bank had issued to Terlinden. Stats. 1898, sec. 2769, subd. 1. The equitable action was, therefore, brought by the plaintiff, to which *Umbreit* was made a party, in order to reach the indebtedness represented by the negotiable instrument and subject it to any judgment which might be obtained in the main action. At the time this action was brought *Umbreit* had brought his action against Terlinden, obtained service by publication only, and had attempted to garnish the Marine National Bank, but had obtained no judgment. In the complaint in the equitable action the plaintiff alleged that *Umbreit* claimed a lien on the instrument by reason of his subsequent garnishment of the bank, but alleged that such garnishment was without validity and without jurisdiction, and therefore prayed that *Um-*

breit's lien be cut off. *Umbreit* answered, claiming an indebtedness of Terlinden to him of $7,500 as aforesaid, and setting up the commencement of his action therefor and his garnishment of the Marine Bank. The court found that *Umbreit* commenced his action and obtained service by publication only; that he obtained his judgment by default for the full amount claimed, but made no findings as to the merits of *Umbreit's* claim. The court also found that *Umbreit,* at the commencement of his suit, served garnishee process on the Marine National Bank, but concluded that, as the only liability of the Marine Bank arose by reason of the issuance of a negotiable instrument to Terlinden, no lien thereon or on the liability of the bank was secured by either plaintiff's or defendant's garnishment proceedings.

There is no bill of exceptions in the case, and hence the findings of fact are solely to be considered, and by them we are only informed that *Umbreit* obtained judgment by default upon substituted service of the summons, and the question has occurred to us (though not suggested in the briefs) whether such a judgment constitutes any proof that any sum was owing from Terlinden to *Umbreit;* in other words, is the judgment itself proof of personal liability, especially when the parties are litigating their rights before a court of equity? The validity and justice of the plaintiff's judgment in the main action cannot be questioned, because it was rendered after personal service of the summons and is unappealed from, but the defendant *Umbreit* has no such judgment and is not found, as matter of fact, to have had any claim against Terlinden, except his judgment obtained by default on substituted service. When he comes into a court of equity and makes his affirmative claim for priority of right in property which the plaintiff had in form equitably impounded and upon which he (*Umbreit*) had no actual lien, must there not be a finding that he actually had a just claim in order to justify the court in protecting him? Is his judgment any

proof of his claim against Terlinden, except as to property garnished or attached? The principle is familiar and well settled that in an action against a nonresident, where there is only substituted service of the summons, the court acquires no jurisdiction for mere purposes of personal adjudication, but only to enter a judgment with reference to or to be enforced upon property within the state or a judgment concerning the status of one of our own citizens. *Moyer v. Koontz,* 103 Wis. 22, 79 N. W. 50; *Pennoyer v. Neff,* 95 U. S. 714. The judgment in such action will, of course, be effective so far as it affects or may be enforced against the property of the defendant which has actually been seized by attachment or garnishment. It has also been held by this court, contrary to the rulings in some jurisdictions, that it is not essential that the property within the state be seized by writ of attachment, but that, if the facts required by the statute to authorize the order for publication appeared by proper affidavit, the court would acquire jurisdiction to render a judgment good at least against the property described in the moving papers, providing it had not been removed from the state or sold to an innocent purchaser before the rendition of the judgment. *Jarvis v. Barrett,* 14 Wis. 591; *Gallun v. Weil,* 116 Wis. 236, 92 N. W. 1091. But it was further held, prior to the passage of ch. 29, Laws of 1868 (secs. 13–15, ch. 124, Tay. Stat.), that the property within the state must be specifically described in the moving affidavit upon which the order of publication is based or the court will acquire no jurisdiction. *Winner v. Fitzgerald,* 19 Wis. 393. The property so described need not be property which can be attached, but may be such property which can only be reached by creditors' bill, such as debts owing by a resident to a nonresident, and it is now sufficient if it be described in the complaint. *Bragg v. Gaynor,* 85 Wis. 468, 55 N. W. 919.

The act of 1868, above named, as codified by subd. 1, sec. 2639, R. S. 1878, added a new class of cases in which service by publication was authorized, namely, cases where

the cause of action arose in this state and the court has jurisdiction of the subject of the action. In *Witt v. Meyer*, 69 Wis. 595, 35 N. W. 25, this court expressed a grave doubt whether, in such case, the court would obtain any jurisdiction either of person or property unless it also appeared by the affidavit that the defendant had property in this state which was described; citing, in addition to *Jarvis v. Barrett, supra, Rape v. Heaton,* 9 Wis. 328, and *Jones v. Spencer,* 15 Wis. 583. Just previous to this decision it had been held, in *Smith v. Grady,* 68 Wis. 215, 31 N. W. 477, that a foreign personal judgment founded alone upon service of process outside of the jurisdiction, there being no property within that jurisdiction, was absolutely void; citing *Jarvis v. Barrett, supra.* In view of the doctrine announced by the supreme court of the United States in *Pennoyer v. Neff,* 95 U. S. 714, which is a leading case on this subject, and which was cited with approval by this court in *Moyer v. Koontz, supra,* we think it must be considered as settled that the doubt expressed in *Witt v. Meyer* was well founded, and that such judgments, except those affecting the status of a citizen, can go no farther than to be effective as to property within the state at the time of the commencement of the action, which property must be described in the moving papers. Now, it does not appear in the findings in the present case that the debt from the Marine Bank to Terlinden was named or described in the papers upon which the order of publication was based. It is true that it appears that judgment was entered in the action, and it may be claimed that the presumption of regularity in the proceedings of a court of general jurisdiction should be indulged in. The difficulty with this claim is that it appears that *Mr. Umbreit* did have a valid garnishment of the funds in the First National Bank, which he acquired at the time he commenced his suit, and this would fully justify the court in entering the formal judgment in the main action, so the office of any presumption seems very doubtful at best.

We conclude that in the case of the creditors' bill against

the Marine Bank the mere finding that a judgment was obtained by *Umbreit* by default upon substituted service is insufficient to authorize this court to hold that any jurisdiction was obtained of the debt due from the bank, because it does not appear affirmatively that in that action this property was described in the affidavit or complaint on which the order of publication was based. In view of the fact that this point seems to have been overlooked in the trial of the case, judgment will not be directed here, nor, on the other hand, will a new trial of the case be ordered. The Marine Bank Case will be sent back with directions to allow the defendant *Umbreit* to introduce proof showing that the debt due from the Marine Bank was properly described in the affidavit or complaint upon which the order for publication was based, in which event his judgment will be given preference over the plaintiff's claim to the full amount thereof; in case, however, such was not the fact, he should be allowed to introduce extrinsic evidence of the amount justly and equitably due him, and the plaintiff should be allowed to meet such claim by evidence to the contrary, and the amount found by the court to be justly due *Mr. Umbreit* over and above what he may actually realize from the judgment in the garnishment action should be given preference, after which the plaintiff's claim should be allowed.

By the Court.—The judgments in both actions are reversed, with costs. The garnishment action is remanded with directions to render judgment for the defendant *Umbreit* that he recover the sum garnished, with costs. The equitable action is remanded to take further proof, and for judgment in accordance with the opinion.

CASSODAY, C. J. (*dissenting*). I briefly state the grounds of my dissent in this case. It seems to be well established that one alien may sue another alien in the state courts upon contract made abroad or for a tort committed in a foreign coun-

try, if the defendant is transiently in the state and service is had upon him as in the case at bar. 2 Am. & Eng. Ency. of Law (2d ed.) 66, 67; 2 Cyc. 105–107. This seems to be conceded. Such right to maintain suits in the state courts, however, is of little or no value unless the plaintiff in such action is entitled to the remedies given to domestic creditors. And so, "by comity and the laws of the states, resident aliens have the right to the same remedies in courts as citizens, and no court will deny those rights without positive legislation taking them away;" and this rule applies to all personal actions. 2 Cyc. 107, 108. Of course the *lex fori* governs in all matters relating to the remedy and the course of procedure. 22 Am. & Eng. Ency. of Law (2d ed.) 1383.

"The right to proceed by process of attachment has been limited by the statutes of some of the states to a citizen of the state or to a citizen of some other of the United States. As a rule, however, at the present time this right is not ordinarily affected by the question of citizenship, and it is generally immaterial that the attaching creditor is a nonresident." 4 Cyc. 406.

"Where the statutory grounds for the issuance of the writ of garnishment exist, the proceedings may be instituted against all persons, both individual and corporate, and irrespective of whether they are residents or nonresidents, unless, of course, they enjoy some special immunity from suit. The statutes authorizing the issuance of writs of garnishment are, as a rule, very broad in regard to the persons who may take advantage of the process, and generally provide for its issuance on the application of *any person;* and the word 'person,' as so used, has been held to include all individuals, nonresidents as well as residents, corporations, and sovereignties." 14 Am. & Eng. Ency. of Law (2d ed.) 752.

"Since, as a general rule, the garnishing creditor acquires no greater right in the property or credits in the hands of the garnishee than that possessed by the defendant at the time of the service of the writ of garnishment, a prior valid sale or assignment or lien or incumbrance thereon will take precedence over a subsequent garnishment. On the other hand, as

the garnishing creditor succeeds to all the rights and interests of the defendant at the service of the writ, the rights of the garnishing creditor are not affected by any alienation by the defendant or incumbrance created or arising subsequently to the service of the writ." 14 Am. & Eng. Ency. of Law (2d ed.) 867.

The same is true as to attachments. 4 Cyc. 632. Our statutes give the right of garnishment in broad terms, and extend to actions "to recover damages founded upon contract, express or implied," and extend to cases where "the defendant fraudulently contracted the debt or incurred the obligation respecting which the action is brought" and to cases where the "defendant is a foreign corporation" or a nonresident. Stats. 1898, secs. 2731, 2753. This court has repeatedly held that proceedings by garnishment or creditors' bill to reach nonleviable assets are, in effect, an equitable levy from the time of service of process. *La Crosse Nat. Bank v. Wilson,* 74 Wis. 391, 43 N. W. 153; *Bragg v. Gaynor,* 85 Wis. 468, 55 N. W. 919. It follows from what has been said that the plaintiff was properly allowed to maintain this action against Terlinden for the tort committed by him in Germany in May, 1901, and, since personal service was had upon him in Milwaukee August 17, 1901, and the First National Bank of Milwaukee garnished on that day, the funds in the bank were subject to garnishment, and the plaintiff by such garnishment obtained an equitable lien upon the funds deposited in the bank August 14, 1901.

The fact that the plaintiff obtained judgment against Terlinden February 19, 1904, for a large amount, and that judgment never having been appealed from, would seem to conclusively establish the right of the plaintiff to maintain this action against Terlinden. The plaintiff having the right to maintain this action against Terlinden, then, unless there is some law to the contrary, or the plaintiff is precluded by the bankruptcy proceedings in Germany, it would seem that he

also had the right to maintain garnishment proceedings against the bank. The plaintiff here is acting in harmony and co-operating with the German trustee and the German consul at Chicago for the benefit of all the creditors of Terlinden and not in violation of the clause of the German bankrupt act quoted in the opinion filed. The whole purpose of that provision, as I understand, was to prevent one creditor by such attachment or execution from obtaining a preference over other creditors in the courts of Germany. Here, in defiance of comity, it is invoked to give an American creditor preference over all German creditors, and on a claim which had no existence when the bankruptcy proceedings were instituted, but accrued afterwards. Besides, that provision, as I understand, relates wholly to the remedy for proceedings in Germany. The remedies here given by our courts are, as I understand, given and regulated entirely by our statutes, and not by the statutes of Germany. The provision quoted does not go to the right of action but to the remedy merely. Terlinden is here adjudged to have fraudulently obtained from the plaintiff the money here sought to be reached by garnishment. The right of action has been adjudged to be in the plaintiff. According to the judgment Terlinden had no defense. There is no attempt on the part of the plaintiff to obtain a preference over other creditors of Terlinden. On the contrary, and as the appellant claims, the plaintiff was acting in harmony with the trustee and for the benefit of all the creditors. Should the appellant's claim which accrued subsequently to the bankruptcy proceedings be allowed, it would to that extent defeat the bankruptcy proceedings and give a preference to an American creditor over all German creditors. It is true that the rule of comity does not hold courts down to strict legal or treaty obligations. But it requires states or nations to give effect to foreign laws and judicial proceedings, not so much—in the language of Mr. Justice STORY—as "a matter of comity or courtesy as a mat-

ter of paramount moral duty." Story, Confl. of Laws, 32. It is not only a friendly courtesy but a mutual courtesy, which requires the courts of the one state or country to do what the courts of the other states or country would be expected to do under similar circumstances. Here the domestic creditor is allowed to supersede and set aside an equitable lien obtained long before the claim of the domestic creditor accrued, and upon the sole ground that the garnishing creditor is an alien. Should a Wisconsin citizen embezzle the funds of another Wisconsin citizen and then abscond to Germany, and the Wisconsin creditor pursue him to that country and obtain personal service upon him by proceedings in the courts of that country, and then attach or garnish the funds so embezzled, it would hardly be expected that a German court would allow the lawyer whose claim accrued after such attachment or garnishment, in resisting the same, to supersede such attachment or garnishment and obtain the funds so embezzled for his remuneration in performing such service. If it did we would hardly recognize it as an act of comity or courtesy to an American citizen or American law, much less "as a matter of paramount moral duty."

In my opinion the judgment should be affirmed in this case and modified in the other, according to the rights of the parties under the creditors' bill.

The respondent moved for a rehearing.

Winkler, Flanders, Smith, Bottum & Fawsett, attorneys, and *F. C. Winkler,* of counsel, for the motion.

Joseph B. Doe, contra.

The motion was denied April 17, 1906, and the following opinion was filed May 8, 1906:

WINSLOW, J. Upon motion for rehearing in these cases our attention is called to art. I of the treaty concluded be-

tween the United States and the Kingdom of Prussia in 1828, which reads as follows:

"There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places, and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submittng to the laws and ordinances there prevailing."

Attention is also called to a provision in the treaty of 1799 between the same parties as follows:

"Each party shall endeavor by all the means in their power to protect and defend all vessels and *other effects* belonging to the citizens or subjects of the other, which shall be *within the extent of their jurisdiction by sea or by land.*"

We have been unable to see that either of these treaty provisions has any bearing on the questions in controversy here.

By the Court.—Motion denied.

In re Salter and another.

January 13—April 17, 1906.

Incorporation of villages: Appeal and error: Appealable orders: Certiorari: *When writ does not lie.*

1. An order incorporating a village under secs. 854–866, Stats. 1898, is a final order made in a special proceeding, and hence appealable.
2. An appeal from an order incorporating a village under secs. 854–866, Stats. 1898, is an adequate remedy, and hence *certiorari* will not lie to review such an order.

CERTIORARI to review proceedings of the circuit court for Marathon county: GEO. W. BURNELL, Judge. *Writ quashed.*

R. J. MacBride and *Geo. L. Jaques,* for the relator.

For the respondent there was a brief by *Brown, Pradt & Genrich,* and oral argument by *Neal Brown.*

The following opinion was filed January 30, 1906:

KERWIN, J. This is a *certiorari* proceeding issued out of this court to review the proceedings of the circuit court for Marathon county in a special proceeding for the incorporation of a village under secs. 854–866, Stats. 1898. The relators appeared upon the hearing in the circuit court and made several objections, claiming that the court had no jurisdiction. These objections were overruled, and after hearing the court made an order incorporating the village of Unity. The order is a final order made by the court in a special proceeding, and hence was appealable. An appeal from such an order is an adequate remedy, and where such remedy exists *certiorari* will not lie. *State ex rel. C. & N. W. R. Co. v. Oshkosh, A. & B. W. R. Co.* 100 Wis. 538, 77 N. W. 193, and cases cited.

By the Court.—The writ of *certiorari* is quashed.

A motion for a rehearing was denied April 17, 1906.

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ABATEMENT. See PLEADING, 5.

ABUSE OF DISCRETION. See APPEAL, 26, 28, 30. CERTIORARI, 2. DISCOVERY, 2. GUARDIAN AND WARD, 7. NEW TRIAL, 3, 4. TRIAL, 2.

ABUTTING OWNERS. See MUNICIPAL CORPORATIONS, 7–11.

ACCEPTANCE. See BILLS AND NOTES, 1. SUNDAY, 1.

ACCIDENT INSURANCE. See INSURANCE, 18–21.

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ACTION.

Cause of action. See ACTION, 2, 3. ALIENS, 2, 3, 5, 6. ASSOCIATIONS, 7. BROKERS, 1–4, 6–8. CERTIORARI, 1–10. CONTRACTS, 2–4. CORPORATIONS, 2. DAMAGES. DEEDS, 2, 3. EXECUTORS AND ADMINISTRATORS. FIXTURES. FRAUD. GARNISHMENT. GIFTS. GUARDIAN AND WARD. HUSBAND AND WIFE. INNKEEPERS. INSURANCE, 11–21. LANDLORD AND TENANT. LIBEL AND SLANDER. LIMITATION OF ACTIONS, 3–8. PAUPERS. PLEADING, 1.

Nature and form.

1. An independent proceeding commenced by an original writ, such as *certiorari*, *mandamus*, and the like, is an action under sec. 2595, Stats. 1898. *State ex rel. Milwaukee Medical College v. Chittenden*, 468

Joinder of causes of action. See GIFTS, 2.

2. Sec. 1199, Stats. 1898, prescribing the elements of a complaint in an action to bar former owners of lands on which the defendant holds tax deeds, constitutes an exception to the requirements of sec. 2647. *Corry v. Brown*, 140

3. A cause of action to enforce a trust or estoppel against a defendant as an individual cannot be joined with or converted into a cause of action against him as administrator. *Tyler v. Stitt*, 379

Limitations. See EXECUTORS AND ADMINISTRATORS. GUARDIAN AND WARD, 9–15. LIMITATION OF ACTIONS. MUNICIPAL CORPORATIONS, 16. TAX TITLES, 2.

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ADJUDICATION. See PRINCIPAL AND SURETY, 1–3.

ADMINISTRATIVE DISCRETION. See CONSTITUTIONAL LAW, 1, 2.

ADMINISTRATORS. See ACTION, 3. APPEAL, 25–31. EXECUTORS AND ADMINISTRATORS. GIFTS, 2. LIMITATION OF ACTIONS, 5–8.

ADMISSIONS. See RAPE, 7.

ADVERSE PARTY. See DISCOVERY. LIBEL AND SLANDER, 7. REFERENCE.

AFFIDAVIT. See ALIENS, 5. CHATTEL MORTGAGES, 1, 2. CRIMINAL LAW, 1.

AGGRIEVED PARTY. See APPEAL, 25.

ALIENS.

See JURY.

1. Aliens who are *sui juris* and not specially disabled by the law of the place where action is brought may there maintain suits to vindicate their rights and redress their wrongs. *Disconto Gesellschaft v. Umbreit,* 651

2. Plaintiff, a resident and citizen of Germany, brought action in a court of this state against a nonresident alien, temporarily within the state, to recover on a transitory cause of action arising without the state, and by the process of garnishment sought to impound property of the debtor within this state to satisfy its judgment therefrom. U., another creditor of the debtor, was a resident and citizen of Wisconsin, and had secured by garnishment a lien on the same property, but his proceedings were subsequent in point of time to those initiated by the alien creditor. The domestic creditor, having obtained judgment, thereafter intervened in the action brought by the alien. On appeal from a judgment in favor of the alien, *held:*

(1) The main action could not be maintained by the alien as a matter of right, but only on the principles of comity.

(2) The auxiliary action of garnishment by the alien was governed by the same principles that applied to its main action, notwithstanding the fact that residents and citizens of Wisconsin were parties to the auxiliary action as stakeholders or claimants of impounded property.

(3) Comity does not allow an alien creditor to seize and carry away property within the jurisdiction of Wisconsin courts when a resident creditor stands also at the bar of the same court with a judgment and provisional lien, and thus force such resident creditor to go to a foreign court to collect his debt.

(4) It makes no difference that the home creditor's claim may have accrued after that of the alien; the question is not to be determined by priority in point of time, but by the situation at the time the court is called upon to finally decide which creditor shall receive its aid.

(5) To allow the alien creditor, really the mere agent of a foreign trustee in bankruptcy, to recover would overrule the policy of the state that a foreign trustee or receiver in involuntary bankruptcy proceedings can obtain no title to the debtor's property in Wisconsin. *Ibid.*

3. The rule that a resident of another state may sue another nonresident on a transitory cause of action arising out of Wisconsin, in the Wisconsin courts, as a matter of strict right, is based solely upon the provisions of sec. 2, art. IV, Const. of U. S. *Ibid.*

4. By the rules of comity, the courts of one state will voluntarily enforce the laws of a friendly state or nation when, by such enforcement, they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens. *Ibid.*

5. In an equitable action to determine the rights of two creditors to a fund, it appeared, among other things, that one creditor was a nonresident alien, and that the other creditor, U., had reduced his claim to judgment, obtained by default upon substituted service of the summons. On the trial of such equitable action the court gave judgment in favor of the alien creditor, but made no finding as to the merits of U.'s claim, or that it was named or described in the papers upon which the order of publication was based, and there was no bill of exceptions returned with the record on the appeal from the judgment entered in the equitable action. *Held*, that a mere finding that a judgment was obtained by U. by default upon substituted service was insufficient to authorize the appellate court to hold that any jurisdiction was obtained of the debt due from the bank, since it did not appear affirmatively, from such findings, that the property was described in the complaint, or in the affidavit on which the order of publication was based. *Ibid.*

6. In such case the judgment was reversed for the purpose of allowing U. to introduce proof showing that the debt due from the bank was described in the affidavit or in the complaint, in which event judgment was directed in his favor; but in case such was not the fact, it was directed that U. be allowed to introduce extrinsic evidence of the amount justly and equitably due him, which the alien creditor was to be allowed to meet, and the amount found to be justly due U. was directed to be given the preference over the alien creditor's claim. *Ibid.*

7. Treaties between the United States and the Kingdom of Prussia dated in 1799 and 1828, referred to in the opinion, are considered to have no bearing on the controversy raised in this action. *Ibid.*

8. CASSODAY, C. J., dissenting, is of the opinion that by its garnishment proceedings the alien creditor obtained an equitable lien which should be preferred over that of the resident creditor. *Ibid.*

AMBIGUITY. See SALES, 1.

AMENDMENT.
Of charter. See CORPORATIONS, 3. MUNICIPAL CORPORATIONS, 1.
Of pleading. See PLEADING, 1, 2, 4.
Of writ. See ASSISTANCE, WRIT OF, 7.

ANSWER. See CHATTEL MORTGAGES, 3, 4. PLEADING, 5, 6. SUNDAY, 3.

APPEAL.

Jurisdiction. See COURTS, 1–3.

Decisions reviewable: Appealable orders. See CERTIORARI, 11.

1. An order in proceedings pursuant to sec. 1210*b*, Stats. 1898, staying all proceedings in the action until there can be a re-assessment of all the property of the municipality affected, is not appealable. *Maynard v. Greenfield*, 103 Wis. 670, followed and approved. *Land and Securities Co. v. South Milwaukee*, 284

2. Sec. 1210*b*, Stats. 1898, under which such order was entered, contemplates that the action shall be closed by a judgment; and such order is a mere intermediate direction reviewable on appeal from the final judgment. *Ibid.*

3. In such case it is suggested that it would be proper practice to enter an interlocutory judgment from which an appeal could be taken, and such judgment would prevent all prejudice to litigants that might otherwise arise under the present condition of the appeal statutes, in the administration of sec. 1210*b*, Stats. 1898. *Ibid.*

4. An order incorporating a village under secs. 854–866, Stats. 1898, is a final order made in a special proceeding, and hence appealable. *In re Salter,* 677

Right to review: Persons entitled. See APPEAL, 25. EMINENT DOMAIN, 4.

Presentation and reservation in lower court of grounds for review: Exceptions. See TRIAL, 7.

5. In the absence of exceptions there cannot be reversal for alleged errors. *Brown v. State,* 193

6. It appeared from the record returned on appeal that it contained a statement that appellants duly excepted to portions of the charge to the jury underscored in the body of the charge; that the portions of the charge relied upon as excepted to were underscored, and, in the bill of exceptions, that there were particular specifications of the portions of the charge excepted to, setting out under separate heads the language complained of. *Held,* that the exceptions were sufficiently taken. *Meyer v. Home Ins. Co.* 293

7. Appellant has a right to make specific objection to the particular part of the charge objected to, and is not obliged to embrace parts of the charge not objectionable in the exception for the purpose of completing a sentence under a separate exception. *Ibid.*

8. The object of exceptions is to bring to the attention of the court the particular matter objected to. *Ibid.*

Same: Bill of exceptions. See APPEAL, 6, 16.

Requisites and proceedings for transfer of cause: Perfecting appeal. See APPEAL, 26–30.

Same: Laches. See APPEAL, 26–30.

Review: Findings, when disturbed.

9. Where the only questions argued in the supreme court are the mental competency of the testator and the legality of execution of a will, and there is no clear preponderance of evidence against the findings thereon made by the trial court, the judgment will be affirmed. *Krueger v. Krueger,* 103

10. Where the conclusion reached by the trial court is not against the weight of the evidence the judgment will be affirmed. *E. M. Fish Co. v. Young,* 149

11. On appeal the ruling of the trial court refusing to set aside a verdict will only be reversed where there is no evidence to support it, or where, though there is some evidence in its support, still the great weight of the evidence is against it, and that weight is so reinforced by all the reasonable probabilities

and inferences that it becomes overwhelming. *Hirte v. Eastern Wis. R. & L. Co.* 230

12. Respecting the question whether a verdict is sustained by the evidence, and the ruling of the lower court thereon, the supreme court will set aside the findings of the jury only when there is no evidence to sustain the verdict, or where, though there be some evidence in its support, still the great weight of the evidence is against it, and that weight is so reinforced by all the reasonable probabilities and inferences that it becomes overwhelming. *Meyer v. Home Ins. Co.* 293

13. In an action for damages for the breach of a contract, a finding by the referee before whom the action was tried that certain transactions were an abandonment of the contract and not a partial and mutual settlement between the parties, being supported by ample evidence, will not be disturbed. *Eastern R. Co. of Minn. v. Tuteur,* 382

14. In an action on a bond securing the performance of a freight-handling contract, under the evidence, stated in the opinion, a finding that contracts for certain work, alleged to be such a modification of the contract as to release the sureties on the bond, were for work outside of the freight-handling contract, will not be disturbed. *Ibid.*

15. Where the trial court has refused to find that any fraud existed, and there is nothing in the record which would entitle the party alleging fraud to relief on that ground, the action of the court will not be disturbed. *Barry v. Minahan,* 570

Same: Presumptions.

16. Evidence, consisting of maps referred to in the testimony as present on the trial, not brought before the supreme court in the bill of exceptions, will be presumed to have supported the findings made by the trial court. *Post v. Roberts,* 605

Same: Questions considered. See APPEAL, 2.

17. Where the court, in its general charge, gave correctly an abstract rule of law, and there must be a reversal on other grounds, it is not necessary to decide whether the charge sufficiently met specific instructions asked. *Brown v. State,* 193

Conclusiveness of former decision: Res adjudicata. See JUDGMENTS, 1.

Affirmance and reversal: Material and immaterial errors. See ALIENS, 5, 6. APPEAL, 9–17, 25. ASSISTANCE, WRIT OF, 4. BROKERS, 3, 8. COMPROMISE AND SETTLEMENT, 3. COSTS, 1. DAMAGES. EVIDENCE, 2, 3, 6–8, 11, 12, 15, 20, 21. FRAUD, 1. GUARDIAN AND WARD, 8. INSURANCE, 11, 12, 15. JUDGMENTS, 2. LANDLORD AND TENANT, 4. LIBEL AND SLANDER, 7. MASTER AND SERVANT, 3, 5, 16. NEW TRIAL, 3. PATENTS, 2–4. RAPE, 7. SALES, 1, 2, 4. STREET RAILROADS, 2, 4, 5. TRIAL, 5, 10, 12–14, 18–20. WILLS, 2, 4. WITNESSES, 6–8.

18. Where, on a first appeal, a judgment in favor of plaintiff was reversed for error, on a second appeal a judgment of nonsuit was reversed and a new trial ordered, and on the third appeal the evidence was close upon some material questions, it cannot be said, as matter of law, that there is error in refusing to direct a verdict in favor of defendant. *Hupfer v. Nat. D. Co.* 306

19. Where no application is made to the trial court to be relieved from a stipulation that a guardian received a sum of money belonging to his ward at an agreed date, and that no testimony

should be received in conflict with the stipulation, it must be held to control on appeal. *Abrams v. U. S. F. & G. Co.* 579

Determination and disposition of cause: Reversal: New trial or direction of judgment: Practice.

20. Upon the reversal of a judgment by this court the case is required to be remanded for a new trial only when necessary, and that condition is always deemed to exist, as to a jury case, when, under any circumstances, a new trial might result otherwise than in such a judgment being awarded as would have been rendered before had that fatal error, or errors, not been committed. *Hay v. Baraboo,* 1

21. The practice rule that it is not permissible for a defendant to have judgment in the trial court notwithstanding the verdict, and, to the extent indicated, the one that a judgment in a jury case after trial can only be legitimately granted on a verdict which will support it, are obsolete. *Ibid.*

22. A verdict having been rendered, which upon its face is contrary to the undisputed evidence, it may be changed upon motion to correspond with the established state of the case and a judgment be rendered thereon, or judgment may be rendered upon motion of the party against whom the erroneous verdict stands notwithstanding the same. In the event of the proper motion being made in either case in the circuit court and denied and of judgment being rendered according to the erroneous verdict, and the same being reversed upon appeal to this court, the cause may be remanded with directions to grant the motion and render judgment accordingly. *Ibid.*

23. The last foregoing rule is based on the theory that a motion having been made in the court below enabling such court to pass upon the identical question decided here and requiring a reversal, the proper solution of which question in the first instance must necessarily have terminated the litigation, the prevailing party on appeal is entitled to have the error fully corrected, which can only be done by requiring the lower court to pass upon such question as it should have done originally, and to close the case accordingly. *Ibid.*

24. The rule stated is extended beyond situations to which it has previously been applied, so that in case of a motion for the direction of a verdict at the close of the evidence being denied and a verdict being rendered for the adverse party, and its being held upon appeal that the motion should have been granted, and for reasons necessarily precluding the losing party from securing any different result by another trial than the one that would have necessarily followed a correct decision of the motion in the first instance, this court may cause the litigation to be terminated in the court below without a new trial, to that end remanding the cause with directions to grant the motion previously denied, and to render judgment accordingly. *Ibid.*

Same: Mandate. See ALIENS, 6.

Appeal to circuit courts. See EMINENT DOMAIN, 4.

Appeal from county court: Right to review: Persons entitled.

25. An executrix is an aggrieved party within the calls of sec. 4031, Stats. 1898, and entitled to appeal from an order or judgment

of the county court construing a will, and hence it is not error to deny a motion to dismiss her appeal. *In re Paulson's Will,* 612

Same: Requisites and proceedings: Discretion: Laches.

26. Under sec. 4035, Stats. 1898, application to the circuit court for leave to appeal from an order of the county court after the time within which an appeal may be taken as a matter of right has expired, is addressed to the sound discretion of the circuit court, and the determination of that court will not be disturbed unless it clearly appears that such discretion has been abused. *In re O'Hara's Will,* 258

27. Under the facts, stated in the opinion, an application to the circuit court in March, 1904, for leave to appeal from an order of the county court construing a will entered in March, 1903, is *held* barred by laches. *Ibid.*

28. In such situation there is *held* to be no abuse of discretion in denying the application. *Ibid.*

29. Under sec. 4031, Stats. 1898, an appeal from an order or judgment of a county court is taken by filing the prescribed notice within the sixty days allowed, and an undertaking perfecting such appeal filed a few days after the expiration of the sixty days, if otherwise sufficient, should be accepted and approved by the county court. *In re Box's Will,* 264

30. In such situation, if the county court refuses to approve such undertaking, the circuit court on petition should, under the provisions of sec. 4035, Stats. 1898, allow such appeal upon such terms and within such time as that court deems to be reasonable, and the denying of such a petition is an abuse of discretion. *Ibid.*

Same: Stay of proceedings.

31. Under the provisions of sec. 4036, Stats. 1898, an appeal to the circuit court from an order of the county court settling the account of a guardian and fixing the amount due the ward does not serve to stay the institution of suit in the circuit court on the bond, but merely further proceedings in the county court in pursuance of the order appealed from. *Wescott v. Upham,* 590

APPEALABLE ORDERS. See APPEAL, 1–4. CERTIORARI, 11.

APPURTENANCES. See MECHANICS' LIENS.

ARBITRATION AND AWARD. See CORPORATIONS, 2–6.

ASSESSMENT of taxes. See APPEAL, 1–3.

ASSIGNMENT of mortgages. See ESTOPPEL, 3–5. MORTGAGES, 2.

ASSISTANCE, WRIT OF.

1. Under secs. 3169, 3187, Stats. 1898, and in the absence of a rule of court in that behalf, there is no restraint upon the circuit court as to the necessary proceedings preliminary to the issuance of a writ of assistance to enforce the rights of a purchaser at a foreclosure sale. The circuit court may or may not require notice of the application to be given the occupant, as in its judgment may seem best in the particular case. *Prahl v. Rogers.* 353

2. Under said secs. 3169, 3187, as to premises sold under a foreclosure judgment, one who has connected himself with the title by purchase of the equity of redemption after the filing of a *lis pendens*, as well as an occupant, actual or constructive, is deemed a party to the action and, therefore, chargeable with notice that the ordinary and usual proceedings in the execution of the judgment will occur, including the issuing of a writ of assistance. *Ibid.*

3. The foregoing paragraph has no reference to cases where there is a party in possession under title not reached by the foreclosure judgment. *Ibid.*

4. On a motion to vacate a writ of assistance issued to put the grantee of a purchaser at foreclosure sale into possession, under the facts, stated in the opinion, the showing made was *held* insufficient to indicate, with reasonable probability, that the claim of the moving party could be maintained, and the court was justified in denying the motion and in refusing to leave the moving party to his ordinary remedy to test the truth of the matter. *Ibid.*

5. In the absence of equities superior to or impairing the right of one holding a sheriff's deed issued on a foreclosure sale to apply for a writ of assistance, mere delay on his part is not sufficient to warrant denying the writ. *Ibid.*

6. The right to a writ of assistance is not absolute, and while grounds for withholding it, in the court's discretion, may exist, yet one holding a sheriff's deed on a foreclosure sale, duly confirmed, is *prima facie* entitled to the writ to put him in possession of the subject of the purchase. *Ibid.*

7. The omission of the seal of the court from a writ of assistance is, under sec. 2829, Stats. 1898, an amendable irregularity, and is waived by an appearance and motion to set aside the writ on its merits. *Ibid.*

ASSOCIATIONS.

Rights of members: Control of property. See ASSOCIATIONS, 5–7. RELIGIOUS SOCIETIES.

1. Every participant in a voluntary organization has the absolute right to have its property controlled and administered according to its organic plan and to participate in its affairs in harmony therewith. *Spiritual and P. Temple v. Vincent,* 93

2. A statute enabling a voluntary association to be converted into a corporate entity, and existing when the voluntary association was formed, is incorporated into the association agreement by necessary implication, and every member of such association is conclusively presumed to have impliedly agreed, in joining the association, that it might at any future time be converted into a corporate organization according to the statutes regulating the matter. *Ibid.*

3. In an action to determine the right of possession and enjoyment of property formerly possessed by a voluntary association which had been converted into a corporate entity by the action of a minority of its members, the evidence, stated in the opinion, is *held* to sustain findings negativing all charges of fraud on the part of the minority. *Ibid.*

Incorporation: Name.

4. Where a voluntary association is converted into a corporate entity it is not material that the name chosen for the corporation is precisely the one by which the association was known, so long as the corporation is formed for substantially the same purposes as those of the voluntary association. *Ibid.*

5. If, in changing to a corporation, the steps taken by a voluntary association leading up to the recording of the certificate of organization are in conformity with law and the certificate valid, the corporation thereby *eo instanti* comes into existence with its status as regards the property and other rights of the association and membership in the corporation absolutely fixed, and an immediate and complete substitution of the corporate entity for the association follows. *Ibid.*

6. In such case the substitution of the corporation and memberships therein for the former association and its memberships is complete, regardless of whether a majority or minority of members of the association participated in bringing about the change, all being free to participate if they so desired. *Ibid.*

7. In such case any act done thereafter by persons in control of the corporate affairs in violation of any membership right does not affect the corporate existence or functions. It is a mere private wrong redressible by the appropriate remedy. *Ibid.*

ASSUMPTION.
Of debt. See MORTGAGES, 1.
Of risk. See MASTER AND SERVANT, 7–9, 23–25. SALES, 3. TRIAL, 11.

ATTORNEYS. See GUARDIAN AND WARD, 2, 3. REFERENCE. TRIAL, 1, 3.

ATTORNEYS' FEES. See WILLS, 13–15.

AUTHENTICATION. See JUDGMENTS, 2. WILLS, 1–3.

BANKRUPTCY.

Foreign trustee. See ALIENS, 2, 5.

Preferences.

1. When the creditor of one subsequently adjudicated a bankrupt receives a payment without reasonable cause to believe the debtor insolvent or that he intended thereby to give a preference, although the facts known to the creditor, at the time of the payment, were such as would naturally produce in the mind of a reasonably intelligent man a doubt or suspicion of solvency, and such as would put a reasonably prudent man on inquiry, such payment is not preferential. *Suffel v. McCartney Nat. Bank,* 208

2. Grounds for reasonable belief in a present inability of a debtor to pay debts in the course of business are not necessarily grounds for believing that his property, at a fair valuation, is not sufficient to pay his debts. *Ibid.*

3. Whether the creditor of a bankrupt in receiving a payment had reasonable cause to believe that a preference was intended is a question of fact determinable by the jury or trial court. *Ibid.*

BENEFIT INSURANCE. See INSURANCE, 16, 17.

BILL OF EXCEPTIONS. See APPEAL, 6, 16.

BILLS AND NOTES.

Certificates of deposit. See GARNISHMENT.

Checks: Acceptance. See SUNDAY.

1. The acceptance of a check on a bank is in the nature of a conditional payment, which becomes complete when accepted, and, when the amount due thereon is actually paid, such payment relates back to the time of its delivery. *Jacobson v. Bentzler,* 566

Payment and discharge. See MORTGAGES, 2.

2. The maker of a negotiable promissory note can satisfy it only by payment to the owner at the time or to such owner's authorized agent. If the recipient of the money is not actually authorized the payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note. *Marling v. Nommensen,* 363
3. Such rule applies generally to all negotiable paper independently of the existence of any mortgage or other security. *Ibid.*

Actions. See GIFTS. PATENTS, 2–4. TRIAL, 12–14.

BOARDS.
Of control. See CRIMINAL LAW, 4.
Of dental examiners. See PHYSICIANS AND SURGEONS.
Of health. See PAUPERS.

BOARDING HOUSES. See INNKEEPERS.

BONDS. See COUNTIES. GUARDIAN AND WARD, 9, 10, 12–15. PRINCIPAL AND SURETY.

BOOKS. See EVIDENCE, 8.

BROKERS.

Employment: Compensation: Actions.

1. Under a contract to pay a broker, for his services in endeavoring to effect a sale, two per cent. of the price for which the property should be sold to any customer produced by him, the broker earns his commissions if he produces a purchaser to whom the principal in fact sells. *Bowe v. Gage,* 245
2. Where there is evidence tending to prove the making of a contract to pay a broker, for his services in endeavoring to effect a sale, a certain percentage of the price for which the property should be sold to any customer produced by him, and also of the production of a purchaser to whom a sale was in fact made, in an action to recover commissions it is not error to refuse a nonsuit or to refuse to direct a verdict for defendant. *Ibid.*
3. A real-estate broker employed to procure a purchaser, after expending considerable effort to obtain a possible purchaser, on representation by the principal that he had decided to keep the land and not sell it, was induced to accept a small sum in full for his services. The principal, however, at once proceeded to sell to the very customer brought to his notice by the broker. *Held,* that the statement that the principal had decided to keep the land and not sell it was a false representation of an existing fact, although depending on the principal's mental state. *Ibid.*
4. In such case the broker was entitled to retain the money paid, subject only to an equity in favor of the principal that, if the

broker showed himself entitled to payment according to the contract of employment by reason of completed performance thereof, such payment should be applied thereon, and where such application is offered by the complaint and made by the judgment, it is, in practical effect, a return of the money to the principal. *Ibid.*

5. In an action by a real-estate broker to recover commissions, an instruction, stated in the opinion, is *held* erroneous. *Ibid.*

6. When a broker contracts to procure a purchaser for real estate on commission it is not essential that he should himself bring the purchaser bodily to the owner, but it is sufficient if through his efforts a person is found within the time limited, or if no time is limited within a reasonable time, who comes to the owner ready and willing to purchase the property at the required price. *Grieb v. Koeffler,* 314

7. In an action by real-estate brokers for commissions, the evidence, stated in the opinion, is *held* sufficient to sustain a verdict for plaintiffs. *Ibid.*

8. In an action by real-estate brokers for commissions, it was claimed by the defendant that the sale was in fact made through the efforts of another broker, and the defendant was asked to state the circumstances under which an option, which preceded the sale, was finally made, and a general objection to the question was sustained. *Held* error, but cured by subsequent testimony. *Ibid.*

9. In an action by real-estate brokers to recover commissions, under the evidence it is *held* that the rule that where the condition or value of the property has materially changed between the first interview with the broker and the time of the sale it is the duty of the broker to consult his principal and ask for new instructions before making a sale, had no application. *Ibid.*

BUILDINGS. See MASTER AND SERVANT, 17, 25.

BURDEN OF PROOF. See EVIDENCE, 1–3.

CAUSE OF ACTION. See ACTION.

CERTAINTY. See CONTRACTS, 3.

CERTIFICATE OF DEPOSIT. See GARNISHMENT.

CERTIORARI.

See ACTION, 1. COURTS, 1. PHYSICIANS AND SURGEONS, 3.

1. Where a decision by a *quasi*-judicial tribunal affects injuriously and with substantial directness one not a party to the record having no other efficient legal remedy, he may, in the discretion of the court possessed of the jurisdiction, have the use of its writ of *certiorari* to remedy the wrong as to jurisdictional errors. *State ex rel. Milwaukee Med. College v. Chittenden,* 468

2. If in the exercise of sound judicial discretion an injured person ought to be accorded an original writ of *certiorari*, it is an abuse of authority to refuse it. *Ibid.*

3. The rule that no one but a party is entitled to use the remedy of *certiorari* is to be regarded as using the term "party" in its broad sense: that of including all persons injuriously affected

with substantial directness and having no other efficient legal remedy, whether they are parties to the record or might properly be such. *Ibid.*

4. When the writ of *certiorari* is granted to one neither a party to the record nor necessary thereto,—the tribunal in the proceeding sought to be reviewed having jurisdiction of the party or parties and of the subject matter,—such writ reaches only jurisdictional errors committed in deciding a matter within its jurisdiction to decide, proceeding properly. *Ibid.*

5. When the proceeding to be reviewed was direct against person or property, the personal right being the only one involved or being one coupled with another primary right, he is a necessary party and, if not brought in by proper citation, a writ of *certiorari* in his behalf will reach jurisdictional error as to proceeding at all in the matter and excess of jurisdiction as well. *Ibid.*

6. A decision as to the status of a dental college, incidental to passing upon an application for a license to practice dentistry, based on a diploma issued thereby, is within the rule stated as regards discretionary authority to permit the use of the writ of *certiorari* to correct jurisdictional errors. *Ibid.*

7. The writ of *certiorari* is not usable as a means of reviewing legislative discretion, or judicial discretion, or a determination which is strictly a usurpation in that it was pronounced by one having no authority or semblance of authority. *Ibid.*

8. The writ of *certiorari* on behalf of a proper applicant is a proper means of testing, for jurisdictional error, the decision of a *quasi*-judicial tribunal having authority, under some circumstances, to deal with the subject involved, or of a tribunal of such dignity that its action in the matter might probably be injurious to such applicant if allowed to stand unchallenged. *Ibid.*

9. The writ of *certiorari* was, by the constitution, made an appurtenance, as before, to the jurisdiction of superintending control, with its common-law function in that regard and that only. Such function extends wholly to matters of jurisdiction, as regards independent proceedings. *Ibid.*

10. Jurisdictional error, as to a court proceeding according to the course of the common law, relates to the person or the subject matter. Such error as to other tribunals extends to clear errors of law, such as deciding an issue of fact one way when the reasonable inferences from the evidence so strongly point the other way as to leave no reasonable basis for the decision. *Ibid.*

11. An appeal from an order incorporating a village under secs. 854–866, Stats. 1898, is an adequate remedy, and hence *certiorari* will not lie to review such an order. *In re Salter,* 677

CHANGE OF VENUE. See CRIMINAL LAW, 1.

CHATTEL MORTGAGES.

Filing: Renewal: Requisites of affidavit.

1. Under sec. 2315, Stats. 1898, when the affidavit of renewal is made by any person other than the mortgagee, the fact of the agency must be sworn to by the affiant; a mere recital of the

agency is not a part of the affidavit and is insufficient. *Chickering-Chase Bros. Co. v. White,* 83

2. In such case parol evidence of the fact cannot cure the defect. *Ibid.*

Foreclosure: Notice of sale.

3. Under sec. 2316*a*, Stats. 1898, an answer in an action on a promissory note secured by a chattel mortgage, alleging a sale of the mortgaged property without public notice, states a good defense. *Bekkedal v. Johnson,* 624

4. While sec. 2316*a*, Stats. 1898, does not prohibit a sale without public notice, and while it is competent for the mortgagor to waive the statutory privilege of such notice, where the pleading alleging the invalidity of the sale for lack of such notice does not show any such waiver, none can be presumed to support a demurrer thereto. *Ibid.*

5. Under sec. 2316*a*, Stats. 1898, the clause as to selling without notice is not limited to sales within the five-day period, but applies also to sales "at private sale without public notice." *Ibid.*

6. Courts, as well as individuals, in the mere administration of contract obligations in a representative capacity are bound by the law in respect thereto the same as the original possessor of the property affected thereby, and hence the fact that chattel-mortgaged property was *in custodia legis* at the time of making a sale without the public notice required by sec. 2316*a*, Stats. 1898, does not relieve the sale of the consequences imposed by that section. *Ibid.*

7. Under sec. 2316*a*, Stats. 1898, the clause as to liquidated damages relates to the five-day period only, and does not cover sales made without public notice more than five days after the taking possession of the mortgaged property. *Ibid.*

Same: Report of sale.

8. Ch. 122, Laws of 1903, is not a mere remedial statute, but it is designed that its features shall be regarded as incorporated into future mortgage contracts. *Bekkedal v. Johnson,* 624

9. Ch. 122, Laws of 1903, does not apply to mortgages in force before it took effect, otherwise it would fall within the prohibition against legislation impairing the obligation of contracts. *Ibid.*

CHECKS. See BILLS AND NOTES, 1. SUNDAY, 1.

CIRCUIT COURTS. See APPEAL, 26, 30, 31. ASSISTANCE, WRIT OF. CERTIORARI, 9. COSTS, 6. COURTS, 1, 3. EMINENT DOMAIN, 2, 4.

CIRCUMSTANTIAL EVIDENCE. See CRIMINAL LAW, 2–7.

CITIES. See MUNICIPAL CORPORATIONS.

CITIZENS. See ALIENS.

CLAIMS. See EXECUTORS AND ADMINISTRATORS.

CLASSIFICATION. See CONSTITUTIONAL LAW, 9, 10.

CLOUD ON TITLE. See MUNICIPAL CORPORATIONS, 3.

COERCION. See NEW TRIAL, 1, 2.

COLLEGES. See CERTIORARI, 6. PHYSICIANS AND SURGEONS.

COMITY. See ALIENS.

COMMISSIONERS. See EMINENT DOMAIN, 2–4.

COMMISSIONS. See BROKERS.

COMPLAINT. See ACTION, 2, 3. PLEADING, 1–4. RAPE.

COMPROMISE AND SETTLEMENT.

See BROKERS, 4.

1. The whole doctrine of refund upon repudiation of a contract of settlement is, not technical, but equitable, and requires merely that practical rights of the other party shall not be thereby prejudiced; that he shall be no worse off than if he had never made the contract of settlement. *Bowe v. Gage,* 245

2. Application of money paid on a void settlement to an actual existing debt due from the payor entirely satisfies all requirements of refunding or tender as a prerequisite to denying a settlement on the ground of fraud. *Ibid.*

3. Instructions to the jury on the *quantum* and character of evidence necessary to warrant a finding of fraud inducing a settlement, merely cautioning them that they are to find fraud only if they are "satisfied by a preponderance of the evidence," in the face of requests for instructions that, notwithstanding a mere preponderance of evidence, the finding of fraud should not be made unless the jury were satisfied by evidence that was clear, satisfactory, and convincing, are erroneous, since it is only upon evidence that is clear and satisfactory that an affirmative finding of fraud can properly be made. *Ibid.*

CONDEMNATION. See EMINENT DOMAIN.

CONDITIONAL PAYMENT. See BILLS AND NOTES, 1.

CONDITIONS. See LIMITATION OF ACTIONS, 1. WILLS, 8, 12.

CONFIDENTIAL COMMUNICATIONS. See EVIDENCE, 8, 9. LIBEL AND SLANDER.

CONFIDENTIAL RELATIONS. See HUSBAND AND WIFE. WITNESSES, 1.

CONSENT. See RAPE, 2, 3, 5.

CONSTITUTIONAL LAW.

Operation of constitutional provisions. See STATUTES, 1.

Legislative powers and delegation thereof.

1. Authority which, by the constitution, is vested in the legislature, is the power to make law. It may be exercised, leaving in the particular instance to some other agency the duty of determining questions of fact essential to the application thereof. The former involves legislative, the latter administrative discretion. *State ex rel. Milwaukee Medical College v. Chittenden,* 468

2. The true distinction between delegation of power to make law and delegation of power to administer law is this: the former contemplates exercise of discretion as to what the law shall be, the other exercise of discretion in the administration of law. *Ibid.*

3. The legislature may properly designate any agency it sees fit within the state, reasonably calculated to act justly in the matter, to nominate persons for appointment to administer its mere police regulations. *Ibid.*

Judicial powers and functions. See COURTS, 1-3.

4. Sec. 4944c, Stats. 1898, as amended by ch. 28, Laws of 1899, authorizing the board of control, under certain circumstances, to transfer convicts from the state reformatory to the state

prison, is not a conferring of judicial power on the board of control, which, by the constitution, is confined to courts. *In re Harrington,* 241

5. The judicial authority of the constitution is power to administer remedies for remedial rights, formerly exercisable exclusively by courts: to make judicial decisions, strictly so called, in actions or special proceedings and to enforce the same. *State ex rel. Milwaukee Medical College v. Chittenden,* 468

Same: Superintending control. See CERTIORARI, 9.

Same: Foreign judgments. See JUDGMENTS, 3.

Police power. See CONSTITUTIONAL LAW, 3.

6. The police power includes legislative authority to make all regulations reasonably necessary or conducive to the public welfare. *State ex rel. Milwaukee Medical College v. Chittenden,* 468

7. The word "reasonable" limits the police power, both as to subjects to be regulated and the character of the regulation, by express constitutional inhibitions and implied ones as well, and the judgment of the judiciary as to what is within the realm of such subjects and reasonable, fair doubts in all cases being deemed sufficient to turn the scales in favor of legislative authority whenever it shall have been asserted. *Ibid.*

8. There is no such thing as a police power which is above the constitution, or which justifies reasonable or any violation of express constitutional prohibitions or manifest implied ones; the power is hedged about on all sides by constitutional restraints with the judiciary to stand guard at the boundaries. *Ibid.*

Obligation of contracts. See CHATTEL MORTGAGES, 9. CONSTITUTIONAL LAW, 12, 13. LIMITATION OF ACTIONS, 2. PATENTS, 1.

Privileges and immunities. See ALIENS, 3. WILLS, 11.

Same: Religious worship. See WILLS, 11.

Private or local laws: Classification.

9. Under constitutional limitations classification must be based on substantial and real differences in the classes, which are germane to the purpose of the law and reasonably suggest the propriety of substantially different legislation, the legislation must apply to each member of the class, and the classification must not be based on existing circumstances only, but must be so framed as to include in the class additional members as fast as they acquire the characteristics of the class. *Bingham v. Milwaukee Co.* 344

10. Ch. 444, Laws of 1903, is not a special or private law within the prohibition of sec. 31, art. IV, Const. *Ibid.*

11. Under ch. 444, Laws of 1903, the classification of counties by population is not based on existing facts only, but is so framed as to admit additional members, is based on substantial and real differences germane to the subject covered by the law, and the characteristics of the class suggest the propriety of the law as applicable to the class, while refusing it to other counties not in the class. *Ibid.*

Equal protection of laws: Due process of law. See COUNTIES, 1. PATENTS, 1.

12. The property of a mutual insurance company and the equitable property rights of its members are within the guarantees of the

state constitution as regards the inhibition against laws impairing the obligation of contracts, and the inhibition of the national constitution as regards the equal protection of the laws and deprivation of property without due process of law. *Huber v. Martin,* 412

13. A law enacted during the life of a mutual insurance company providing for the distribution of its assets or a bestowal thereof upon another without consent of all of its members, no authority in that regard being contained in the charter of such company, offends against the constitutional limitations referred to. *Ibid.*

14. Where the subject matter involved in a judicial or *quasi*-judicial proceeding is the intangible thing denominated status, the proceedings in respect thereto requisite to a legitimate determination are the same as in a case where the subject matter is of a tangible character. *State ex rel. Milwaukee Medical College v. Chittenden,* 468

15. In any such case the rule applies that no one shall be condemned in his person or his property without first having had his day in court according to the law of the land: the fundamental principles of justice. *Ibid.*

CONSTRUCTION. See WILLS, 8–15.

CONTAGIOUS DISEASES. See PAUPERS.

CONTEMPT.

See DIVORCE, 3. LIBEL AND SLANDER, 7.

1. There is a marked distinction in the remedies afforded and the procedure to be followed in each class between criminal contempts under ch. 117, Stats. 1898, and contempts in civil actions under ch. 150. The former have all the characteristics and incidents of a criminal prosecution in the name of the state, while the latter have those of a civil proceeding. *Emerson v. Huss,* 215

2. The proceedings to punish a civil contempt under ch. 150, Stats. 1898, are designed to enforce obedience to the decrees of the court, to indemnify parties to the action for their actual loss or injury, and to compel performance of duties still within the contemnor's power. *Ibid.*

3. The provisions of ch. 150, Stats. 1898, governing civil contempts, warrant the imposition of a fine or imprisonment, or both, in cases where no actual loss or injury is shown; and when a fine is so imposed it is in the nature of a penalty, and is to be paid into the state treasury to the credit of the school fund. *Ibid.*

4. In cases of civil contempts punishable under ch. 150, Stats. 1898, where actual loss or injury results from the alleged misconduct, *instead* of imposing a fine the proper proceeding is to order a sum to be paid to the aggrieved party to indemnify him for such loss or injury. *Ibid.*

5. In proceedings supplemental to execution a judgment debtor, who was ordered to appear before a court commissioner to answer under oath as to his property and abide the orders of the commissioner, defaulted. Thereafter the commissioner made an order requiring the debtor to show cause before the circuit court why he should not be punished as for a contempt,

and the debtor again defaulted. *Held*, that it then devolved upon the court to determine (1) whether the alleged misconduct had been committed; (2) if the debtor was found guilty, whether such misconduct was calculated to or actually did defeat, impede, or prejudice the rights and remedies of the judgment creditor; (3) if it was so found, whether an actual loss or injury had resulted to the judgment debtor from such misconduct; (4) if no resultant loss or injury was adjudged, to impose a fine or imprisonment, or both, as a punishment for the contempt; (5) if resultant loss or injury was adjudged, to order the defendant to pay to the injured party a sum to indemnify him and to pay his costs and disbursements, and in addition, if a proper case, to coerce performance of acts and duties owing to the injured party, and still in the defendant's power to perform. *Ibid.*

6. In such case the successive adjudication of each of the foregoing propositions was an essential and necessary step to give validity to the proceeding, and, in their absence, no foundation was shown for an order directing the judgment debtor to perform a duty theretofore omitted and still in his power to perform, to pay a fine, and in default to stand committed until the order should be obeyed. *Ibid.*

CONTRACTS.

Requisites and validity. See BROKERS. CORPORATIONS, 5–7. INSURANCE, 11–21. MECHANICS' LIENS. PAUPERS. SALES. SUNDAY.

Same: Executory contracts.

1. An executory contract in which the promises are all on one side is unilateral and not to be enforced. *Eastern R. Co. of Minn. v. Tuteur*, 382

Construction and operation. See ASSOCIATIONS, 1–3. PRINCIPAL AND SURETY. SALES, 1, 2.

2. In an action on a freight-handling contract between a railway company and P., set out in the opinion, P. is *held* to be an independent contractor and not a mere employee of the railway company. *Eastern R. Co. of Minn. v. Tuteur*, 382

3. A freight-handling contract between a railway company, with an established business and dock at a junction point between its line and water navigation, and P., which did not in express words require the railway company to furnish P. any freight to handle, under the situation and circumstances surrounding the parties when the contract was made and the words of the contract, stated in the opinion, is *held* to require the railway company to furnish to P. freight to handle, sufficiently fixed in amount as to render the contract mutual, definite, and certain. *Ibid.*

4. In such case P. had given a bond to secure the performance of such contract, which, in referring to the contract, recited that P. had thereby contracted to handle the freight which the railway company "requests him to handle." It appeared from the evidence, however, that there were carriers who brought merchandise to the railway company's dock, and who had the right to handle their own freight, if they so chose. *Held*, that it did not follow from the quoted words that the railway company was not bound to give P. any freight to handle, since it would

be necessary for the railway company at times to designate to P. the freight which he was to handle and the freight which was to be handled by the carriers themselves, and that such language referred to such contingency. *Ibid.*

Performance or breach. See APPEAL, 13, 14. BROKERS, 1–4, 6–8. COMPROMISE AND SETTLEMENT. DAMAGES, 2. LANDLORD AND TENANT. PLEADING, 6.

CONTRIBUTORY NEGLIGENCE. See TRIAL, 11.

CONVERSION. See DEEDS, 3.

CONVEYANCES. See CHATTEL MORTGAGES. DEEDS. ESTOPPEL, 2–5. MORTGAGES. RECORDING ACTS.

CONVICTS. See CONSTITUTIONAL LAW, 4.

COPIES. See EVIDENCE, 9. JUDGMENTS, 3. WILLS, 1–3.

CORPORATIONS.

Incorporation and organization. See ASSOCIATIONS, 2, 4–7. RELIGIOUS SOCIETIES.

Corporate existence.

1. An unconstitutional act of the legislature is not a sufficient basis for a corporation *de facto*. That can exist only in case of a law under which it might have been created *de jure*. *Huber v. Martin*, 412
2. The law that corporate existence cannot be inquired into, except by judicial proceedings in the name of the state, does not apply to a pretended but not even a *de facto* corporation. *Ibid.*

Corporate name. See ASSOCIATIONS, 4.

Amendment of charter: Power of legislature.

3. The legislature may alter or amend the charter of a corporation but cannot legitimately appropriate its property without the consent of all of its members, either to its own use or that of a private party, though such party be a successor corporation, in the absence of some authorization to the contrary in the charter originally. *Huber v. Martin*, 412

Members: Rights and liabilities: Control of property. See ASSOCIATIONS, 1–3, 5–7. CORPORATIONS, 3, 4. INSURANCE, 1–9.

Same: Surplus: Distribution. See INSURANCE, 7, 8.

Same: Suing or defending on behalf of corporation. See ASSOCIATIONS, 7. INSURANCE, 9.

Officers. See DISCOVERY, 3.

Re-incorporation and re-organization. See INSURANCE, 10.

Dissolution: Property.

4. The supposed common-law rule, that upon the termination of a corporation its debts become extinguished, its realty reverts to the grantors and its personal property goes to the sovereign, if it ever existed in fact, is wholly obsolete, except as to purely public corporations. *Huber v. Martin*, 412

Foreign corporations: Right to transact business: Contracts. See PROCESS.

5. Under sec. 1770*b*, Stats. 1898, a contract made or a lien acquired upon property outside of the state by a corporation not trans-

acting business within the state at the time is not void. *Chickering-Chase Bros. Co. v. White,* 83

6. The failure of the foreign corporation to comply with such statute is defensive matter, and all the facts necessary to bring a case within the statute must be proven or the defense will fail. *Ibid.*

7. Where a foreign corporation held a chattel mortgage on property in Wisconsin, dated before the corporation had complied with sec. 1770*b*, Stats. 1898, and the evidence failed to show that the mortgage was made in this state, and there was no proof that the corporation had ever transacted any business of any nature in Wisconsin prior to the time it filed its articles, a defense that at the time of the execution of the mortgage the corporation had not filed a copy of its articles with the secretary of state is untenable. *Ibid.*

CORPUS DELICTI. See CRIMINAL LAW, 2. HOMICIDE, 1.

CORROBORATION. See RAPE, 4.

COSTS.

Right to costs. See NEW TRIAL, 4, 5. WILLS, 13, 14.

1. In an action by a successor guardian to compel the former guardian to account, it is not error to allow costs against a surety who appeared in and defended the action. *Abrams v. United States Fidelity & Guaranty Co.* 579

Amount, rate, and items: Necessary papers.

2. Findings which upon vital points fail to conform to the direction and decision of the trial court are not "necessary" papers or proceedings in a cause, and charges therefor in a bill of costs presented for taxation should be entirely disallowed. *E. M. Fish Co. v. Young,* 149

Same: Disbursements.

3. Under sec. 2922, Stats. 1898, only the per diem and actual and reasonable expenses of one surveyor and one assistant can be taxed, and it is error to allow either the wages or expenses of axmen, chainmen, cooks, or flagmen, in addition to the one assistant. *Dunbar v. Montreal River L. Co.* 130

[4. Whether sec. 2922 authorizes necessary expenses in addition to mere per diem of the surveyor and assistant, suggested but not decided.] *Ibid.*

5. On the facts, stated in the opinion, an allowance of $100 for the entire reasonable expenses of a survey is held sufficient. *Ibid.*

Taxation: Functions of circuit court.

6. On appeal from the taxation of costs made by the taxing officer, the function of the circuit court is simply to review his conclusion, not to try the question *de novo.* *Ibid.*

COUNTERCLAIM. See PLEADING, 6.

COUNTIES.

See CONSTITUTIONAL LAW, 11. PAUPERS.

Fiscal management: Public debt: Securities.

1. In an action to restrain the issue of bonds of Milwaukee county, proposed to be negotiated under the provisions of ch. 444, Laws

of 1903, the action of the county board in levying a tax to pay the bonds was *held* correct and the only action that would satisfy the constitutional and statutory requirements. *Bingham v. Milwaukee Co.* 344

2. The requirement of ch. 444, Laws of 1903, as to the exact time when the treasurer's bond shall be filed is directory only, at least so long as it is filed before the treasurer's duties began, and failure in this respect to strictly comply with the statute furnishes no ground to enjoin the issue of the bonds. *Ibid.*

3. Ch. 444, Laws of 1903, provides that bonds under the act shall be of three several denominations, "the number of bonds of such denominations to be fixed by the county board." *Held*, that such statute is mandatory to the extent that no bond can lawfully be issued unless it be of one of the denominations prescribed, but does not require that all three of the denominations shall be issued. *Ibid.*

COUNTY TREASURER. See COUNTIES, 3.

COURT AND JURY. See BANKRUPTCY, 3. CRIMINAL LAW, 4–6. EVIDENCE, 14, 15. FIXTURES, 2. FRAUD, 5. MASTER AND SERVANT, 22.

COURTS.

Nature and exercise of jurisdiction. See ALIENS, 1–4, 7, 8. CONSTITUTIONAL LAW, 4, 5, 8.

Same: Rules of decision. See CHATTEL MORTGAGES, 6

Supreme court. See APPEAL.

Circuit courts: Appellate and supervisory jurisdiction. See APPEAL, 26, 30, 31. ASSISTANCE, WRIT OF. CERTIORARI, 9. COSTS, 6. EMINENT DOMAIN, 2, 4.

1. The constitutional grant of appellate jurisdiction given to circuit courts does not include authority to review the proceedings of an inferior tribunal on the merits by the use of a writ of *certiorari*. The use thereof, to commence an action, relates to judicial authority to supervise inferior courts and jurisdictions. *State ex rel. Milwaukee Med. College v. Chittenden*, 468

2. The appellate jurisdiction of the constitution is one thing, the right of appeal is another. The latter is a creature of the legislature and does not exist where the legislature has not acted. *Ibid.*

3. The power of superintending control given to circuit courts is limited by means afforded for its exercise: the functions of the original writs referred to in connection with the grant, all of which appertain to matters of jurisdiction. *Ibid.*

Terms: Review of adjudications. See CRIMINAL LAW, 1.

4. A term for T. county which, under sec. 2424, Stats. 1898, as amended by ch. 6, Laws of 1905, is made a special term for P. county is a separate term for P. county, commencing and ending as a term for P. county with the opening and closing of the term for T. county. *Emerson v. Huss*, 215

5. In such situation no judgment or final order in a special proceeding pending in P. county, but actually entered in T. county, can be reviewed at a term for A. county which is also a special term for P. county, and hence, except as provided by the statute authorizing the court to grant relief from a judgment or

order or other proceeding made through mistake, inadvertence, surprise, or excusable neglect, an order entered in A. county, attempting to modify such order entered in T. county, is unauthorized, void, and of no effect. *Ibid.*

County courts. See APPEAL, 25–31. EXECUTORS AND ADMINISTRATORS. WILLS.

COVERTURE. See HUSBAND AND WIFE. INNKEEPERS, 2, 3.

CRIMINAL CONTEMPT. See CONTEMPT, 1.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See RAPE.

Arraignment and plea. See RAPE, 1.

Change of venue.

1. S., being about to be placed on trial for a criminal offense in the municipal court of Milwaukee county, used his statutory right and obtained a change of venue to the circuit court for that county on account of the prejudice of the municipal judge. Thereafter, in due form of law, he was convicted and sentenced, and, upon writ of error, the judgment of conviction was reversed by the supreme court and the cause remanded for a new trial. At the first term after reversal and on the cause being called for trial, an application, in due form of law, was made for a change of venue on account of the prejudice of the circuit judge, which was denied, and thereupon an alternative writ of *mandamus* was sued out of the supreme court to compel the relief demanded on such application. *Held*, under sec. 4680, Stats. 1898:

(1) The right of S. to make such application by necessary implication carried with it the right to have the application granted in case the moving papers satisfied the statute.

(2) Such application should be made in accordance with the law in a civil action.

(3) The manifest purpose of the proviso in sec. 4680 is to place the accused at the first term of the court after the reversal at which a trial may be had in the same situation, as regards a change of venue, as at the first opportunity for a change after the filing of the indictment or information.

(4) In such affidavit it is not necessary to state facts showing that the existence of prejudice on the part of the judge was unknown to the applicant at any term of court prior to the filing of the application, since there might be one or more terms of court prior to making the application, occurring between the first trial and the first opportunity for a second trial, neither of which would afford opportunity for an application for a change of venue and give rise to any necessity therefor.

(5) S. having been denied a clear statutory right, a peremptory writ of *mandamus* should issue. *State ex rel. Schutz v. Williams*, 236

Evidence: Weight and sufficiency: Corpus delicti. See HOMICIDE, 1.

2. The elements of *corpus delicti* may be established by circumstantial the same as by direct evidence. *Schwantes v. State*, 160

3. Evidentiary circumstances relied upon and essential to establish any necessary element in a criminal prosecution must, in order

to be efficient, be shown to exist to the satisfaction of the jury with the same degree of certainty as the ultimate object of inquiry is required to be to warrant a finding in the affirmative. *Ibid.*

4. Whether any particular evidentiary circumstance claimed to exist tends, in any reasonable view, to prove any element essential to the success of a criminal prosecution, is a matter to be decided by the court on the *voir dire* and its conclusion cannot be disturbed, unless shown to be clearly wrong. *Ibid.*

5. The weight of evidentiary circumstances is wholly for the jury. If, in their judgment, they point to the existence of the main object of search so strongly as to establish its existence to a moral certainty, they should find accordingly the same as in case of belief to a like degree of certainty produced by direct evidence. *Ibid.*

6. If the evidence in a criminal prosecution is susceptible of producing belief of guilt beyond every reasonable doubt, and they find accordingly, their decision cannot be successfully challenged because in the judgment of others the evidence is only susceptible of producing belief of guilt to a less and insufficient degree of certainty. *Ibid.*

Trial: Reception of evidence. See HOMICIDE, 1.

Same: Instructions to jury. See HOMICIDE, 2.

7. In a criminal prosecution the jury may be instructed that they should acquit the accused, unless the evidence in their judgment so strongly establishes his guilt as to exclude every reasonable theory based thereon of innocence. The instruction applies as well to direct as to circumstantial evidence, and should not be given in a way to suggest infirmity as regards the latter. *Schwantes v. State,* 160

8. The trial court in a criminal prosecution may by appropriate language admonish the jury to proceed to the discharge of their duty bearing in mind the importance of the result to the public and the accused as well. *Ibid.*

CROSS-EXAMINATION. See STREET RAILWAYS, 2, 3. WITNESSES, 2-8.

CROSSINGS. See EMINENT DOMAIN.

DAMAGES.

Grounds and subjects of compensatory damages. See CHATTEL MORTGAGES, 7. EVIDENCE, 3. LANDLORD AND TENANT, 5, 6. PRINCIPAL AND SURETY, 1. STREET RAILWAYS, 7.

Measure of damages: Injuries to property.

1. On an issue as to the damages for breaking a picture belonging to an artist, the measure of damages is the pecuniary loss suffered by the breakage—the diminution in the market value of the article injured,—and hence it is not error to strike out testimony as to the value of the broken picture, as a design, apart from its market value. *Wade v. Herndl,* 544

Same: Injuries to the person. See STREET RAILWAYS, 7, 8.

Same: Breach of contract.

2. On trial of an action to recover for breach of a freight-handling contract between a railway company and P., the referee assessed against the sureties on P.'s bond simply the increased

cost of doing the work during the balance of the contract period over and above what it would have cost under the P. contract, deducting payments made to P. and the amount paid for Sunday labor. The referee found that the railway company exercised due care in carrying on the work and paid only the reasonable and necessary cost thereof. *Held*, that the referee applied the right rule in assessing the damages. *Eastern R. Co. of Minn. v. Tuteur*, 382

DAY IN COURT. See CONSTITUTIONAL LAW, 15.

DEBTOR AND CREDITOR. See ALIENS. BANKRUPTCY. CHATTEL MORTGAGES. INNKEEPERS. LIMITATION OF ACTIONS, 5–8.

DECEIT. See FRAUD, 1, 3.

DECLARATIONS. See WILLS, 5.

DEEDS.

See RECORDING ACTS.

Requisites and validity: Delivery.

1. A deed containing an erroneous description of land intended to be conveyed was duly delivered to the grantee, who returned it to the grantor for correction. The grantor thereupon executed a second deed with the proper description, and delivered the same to the register of deeds of the proper county to be recorded for the grantee's use. The deed was recorded accordingly, and thereupon it was sent by mail to the grantor for the grantee's use. *Held*, that there was a sufficient delivery of the second deed. *Whiting v. Hoglund*, 135

2. In such case the facts, stated in the opinion, are *held* to sustain a finding that such deed was not in fraud of creditors. *Ibid.*

Construction and operation: Property conveyed.

3. Plaintiff claimed under a clause in a warranty deed: "The grantor hereby assigns and transfers to the grantee all its claims, demands, or causes of action for or *on account of* any trespass upon the real estate above described." *Held*, that the words "on account of any trespass" covered causes of action for conversion by defendant of timber cut by a third party as the trespasser. *Dunbar v. Montreal River L. Co.* 130

DE FACTO CORPORATION. See CORPORATIONS, 1, 2.

DEFENSES. See CHATTEL MORTGAGES, 3. CORPORATIONS, 6, 7. PLEADING, 5, 6.

DELIVERY. See BILLS AND NOTES, 1. DEEDS, 1. GIFTS. SUNDAY.

DEMAND. See LIMITATION OF ACTIONS, 4, 5.

DEMONSTRATIVE EVIDENCE. See EVIDENCE, 7.

DEMURRER. See CHATTEL MORTGAGES, 4.

DENTISTS. See CERTIORARI, 6. PHYSICIANS AND SURGEONS.

DEPOSITIONS. See DISCOVERY.

DIPLOMAS. See CERTIORARI, 6. PHYSICIANS AND SURGEONS, 8, 13, 14.

DIRECTION OF VERDICT. See APPEAL, 18, 24. BROKERS, 2. FIXTURES, 2. STREET RAILWAYS, 3.

DIRECTORY STATUTES. See COUNTIES, 2, 3.

DISBURSEMENTS. See COSTS, 3–5.

DISCHARGE. See GUARDIAN AND WARD, 9–15. PRINCIPAL AND SURETY, 2–4.

DISCOVERY.

See LIBEL AND SLANDER, 7. REFERENCE.

Under sec. 4096, Stats. 1898.

1. The deposition of the employee of a party taken before trial under the provisions of sec. 4096, Stats. 1898, is inadmissible on the trial when the employee is present in court. *Anderson v. Chicago Brass Co.* 273

2. The power of the court, under sec. 4097, Stats. 1898, to strike out the pleading of an adverse party who refuses to testify under the requirements of sec. 4096 and give judgment as upon default or failure of proof, is discretionary, and will not be reversed except for abuse. *Eastern R. Co. of Minn. v. Tuteur,* 382

3. The president, secretary, or other principal officer of a corporation is, in effect, a party to the action, and his examination taken under sec. 4096, Stats. 1898, so far as competent, is independent evidence in the case, notwithstanding his presence in court. It is otherwise in the case of an employee. *J. H. Clark Co. v. Rice,* 451

DISCRETION. See APPEAL, 26, 28, 30. ASSISTANCE, WRIT OF, 1, 6. CERTIORARI, 1, 2, 6. DISCOVERY, 2. GUARDIAN AND WARD, 6–8. NEW TRIAL, 3–5. TRIAL, 2.

DISSOLUTION. See CORPORATIONS, 3, 4.

DISTRICT ATTORNEY. See LIBEL AND SLANDER.

DIVIDENDS. See INSURANCE, 7, 8.

DIVORCE.

Custody and support of children: Modification of judgment.

1. Under secs. 2362, 2363, 2364, Stats. 1898, the court in which a divorce action has proceeded to judgment has authority to make a new judgment concerning the allowance to minor children as the circumstances of the parents and the benefit of the children shall require, whether or not the original judgment contains any provision concerning such children. *Renner v. Renner,* 371

2. Where a judgment of divorce made a final division and distribution of the husband's estate and awarded the custody of the minor children to the wife but made no provision for the minor children, the court may properly modify the judgment by requiring the husband to pay for their support. *Ibid.*

3. Where such modified judgment specifically declared the allowance for the minor children to be a lien upon the husband's realty, such judgment may be enforced by contempt proceedings. *Ibid.*

DOCUMENTS. See EVIDENCE, 8.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 12–15. COUNTIES, 1. PATENTS, 1.

ELECTRICITY. See MASTER AND SERVANT, 2, 3.

EMINENT DOMAIN.

1. Under subd. 6, sec. 1828, Stats. 1898, no specific act is enjoined upon a railway company seeking to cross the tracks of another, and hence the lapse of over one month after a written proposi-

tion by a petitioner offering to make due and just compensation, and a request for uniting in forming an intersection crossing, justify a finding that the parties were unable to agree. *In re Eastern Wis. R. & L. Co.* 641

2. The proceeding under subd. 6, sec. 1828, Stats. 1898, is not a proceeding for the condemnation of land for the construction of a railroad, but a proceeding to effect a crossing or intersection, and the question of necessity in such proceeding has already been determined by the legislature, and is not one for determination by the court on the application for appointment of commissioners. *Ibid.*

3. Under subd. 6, sec. 1828, Stats. 1898, the petitioner is entitled to the appointment of commissioners to determine the question of a crossing on the route proposed, and whether some other crossing, track, or means had been offered to the petitioner, whether available or not, is immaterial. *Ibid.*

4. In such case, under ch. 497, Laws of 1905, the manner in which grade or other crossings are to be made is to be determined by the commissioners when appointed, with right to appeal to the circuit court from their award; and hence, on an appeal from an order appointing the commissioners, the question of the kind of crossing is not before the court. *Ibid.*

EMPLOYEES. See DISCOVERY, 1, 3. MASTER AND SERVANT. RAILROADS. STREET RAILWAYS, 2–8.

EQUAL PROTECTION OF THE LAW. See CONSTITUTIONAL LAW, 12–15.

EQUITY. See ALIENS, 5, 6. APPEAL, 26–29. ASSISTANCE, WRIT OF, 5. COUNTIES, 1. INSURANCE, 9. MUNICIPAL CORPORATIONS, 4–6. PLEADING, 1, 2, 4.

ESTATES OF DECEDENTS. See ACTION, 3. APPEAL, 25–31. EXECUTORS AND ADMINISTRATORS. GIFTS, 2. LIMITATION OF ACTIONS, 5–8. WILLS.

ESTOPPEL.

See ACTION, 3. GIFTS, 2.

1. One who acts inconsistently with the truth under such circumstances that, as a reasonable person, he ought to anticipate that another is likely to change his position in reliance on such conduct, will be estopped to assert the truth to the injury of such other. *Marling v. Nommensen,* 363

2. Since the adoption of the system of public registry of conveyances, the custom of prompt registration is so nearly universal that omission may be held to be neglect of those precautions customarily taken to assert a grantee's rights in land, and hence it is to be expected that one receiving a conveyance will act confidently on the assumption that all rights will appear from such record. *Ibid.*

3. Plaintiff, owning a mortgage by an unrecorded assignment, knew that the land was held by a dealer in real estate with consequent likelihood of its sale, and it was apparent to the assignee that the record advertised the mortgagee as the person to whom a purchaser must apply, either to clear the title from the lien of the mortgage or for information as to the validity or amount of the lien. *Held,* that the assignee thereby negligently placed it in the mortgagee's power to deceive or mislead a purchaser,

who, both by law and custom, would have a right to rely upon the record. *Ibid.*

4. Such withholding of the assignment from record was a persistent declaration to all persons dealing merely with the title that the mortgagee owned the mortgage. *Ibid.*

5. A mortgage on lands owned by a dealer in real estate was assigned to plaintiff by the mortgagee prior to a sale of the lands to defendant. At the time of the consummation of the sale the vendor paid to the mortgagee the amount of the mortgage and obtained from him a satisfaction of the mortgage, the mortgagee promising to obtain and surrender the mortgage and note within a few days, which he failed to do, but instead absconded, a defaulter. The satisfaction piece was delivered to the defendant and recorded before plaintiff's assignment was recorded. There was nothing to impugn defendant's good faith, and she paid the full price for the land in reliance upon her attorney's examination of an abstract showing only the mortgage, the satisfaction of which was delivered at the same time. *Held*, that plaintiff was estopped, as against defendant, to deny the mortgagee's continued ownership and authority to discharge the mortgage, and that therefore defendant held the land discharged from the lien of the mortgage. *Ibid.*

EVIDENCE.

Presumptions. See APPEAL, 16. ASSOCIATIONS, 2. PHYSICIANS AND SURGEONS, 2. PROCESS. TAX TITLES, 1.

Burden of proof.

1. In an action for personal injuries to a servant from an alleged defective machine, satisfactory proof that the machine worked perfectly both before and after the accident casts the burden on plaintiff to show that its alleged defective action was caused by a defect in the machine. *Chybowski v. Bucyrus Co.* 332

Same: Instructions to jury.

2. An instruction to the jury on the subject of burden of proof and preponderance of the evidence, stated in the opinion, is *held* to give a definition of the term "preponderance of evidence" with substantial correctness, but not so with the definition of "burden of proof." *Anderson v. Chicago Brass Co.* 273

3. An instruction to the jury, on burden of proof, stated in the opinion, is *held* misleading and erroneous, and equivalent to saying that upon the question of damages the burden of proof is not upon the party seeking to establish the affirmative, and is *held* not cured by specific instructions on the question of damages. *Hupfer v. National Distilling Co.* 306

Relevancy, materiality, and competency: Facts in issue. See EVIDENCE, 1. PATENTS, 3, 4. RAPE, 7. STREET RAILWAYS, 2, 3. TAX TITLES. WILLS, 10. WITNESSES, 4–6.

Same: Mental condition.

4. Where a mere mental condition is material, the person whose intent is material should be allowed to testify directly to the existence or nonexistence of such mental state. *Brown v. State,* 193

5. Such evidence, however, is to be weighed with due regard to the ease of the statement and the difficulty of refutation. *Ibid.*

Same: Similar facts and transactions.

6. The admission of evidence of similar transactions between plaintiff and other persons in no way involved in the litigation offered to show fraudulent intent, is prejudicial error. *J. H. Clark Co. v. Rice,* 451

Same: Res gestæ. See RAPE, 7.

Same: Circumstantial evidence. See CRIMINAL LAW, 2–6.

Demonstrative evidence: Photographs.

7. Where, on a former appeal, photographs were held improperly admitted in evidence because the evidence did not sufficiently identify the subject photographed, and, on a subsequent appeal, in view of the testimony on the second trial, it was held error to exclude such photographs, and on the instant appeal it appeared that the evidence tending to establish such identity was much more full and convincing than on the last previous trial, it was *held* that the photographs were properly admitted in evidence, and that there was no error in refusing to strike them out. *Hupfer v. National Distilling Co.* 306

Declarations. See WILLS, 5.

Hearsay. See PATENTS, 3, 4.

Documentary evidence: Maps. See APPEAL, 16.

Same: Public records: Admissibility: Secondary evidence.

8. Under the laws of the United States and the rules and regulations of the treasury department made in pursuance thereof, respecting internal revenue, the officers of the department cannot be compelled to produce their books in evidence or disclose their contents, and copies of such books are not obtainable except under the regulations prescribed by the department. *Held,* that no effort having been made to obtain evidence contained in such books in the manner provided by law, and the records themselves not being admissible, it was not error to exclude testimony of a witness who had examined such books as to their contents. *Meyer v. Home Ins. Co.* 293

9. Such records being privileged and to a certain extent *quasi*-confidential communications, a litigant has no right to the use thereof upon any other basis than such as may be fixed by the United States or under its authority. *Ibid.*

Same: Production and authentication. See EVIDENCE, 8, 9. JUDGMENTS, 3. WILLS, 1–3.

Parol evidence. See CHATTEL MORTGAGES, 2.

Opinion evidence: Subjects of expert testimony.

10. The scope of opinion evidence is not limited by the technical meaning of the term "science, art, or skill." It extends to and includes every subject in respect to which one may acquire special knowledge. *Schwantes v. State,* 160

11. The preliminary questions respecting opinion evidence, *i. e.* that of the competency of the witness and that of whether the subject is within the scope of opinion evidence, are in the field of competency, in which the judgment of the trial court is conclusive, unless shown to be clearly wrong. *Ibid.*

12. Opinion evidence as to a matter of common knowledge is not permissible, though not necessarily prejudicial. *Ibid.*

13. A person of mature years may, regardless of whether he took note of the matter by a clock or watch, testify from his best judgment as to the time of day of any particular circumstance happening under his observation, or the time occupied by the occurrence. *Ibid.*

14. In an action for personal injuries received by a sixteen-year-old boy in operating machinery, the court excluded answers to questions asked experts bearing on whether the machine in question was a dangerous machine, whether it was so regarded, and whether it was not unusual to set boys at work on it for that reason. *Held*, that such interrogatories presented questions to be solved by the jury from the facts and circumstances in evidence, and on which the opinion of experts was not admissible. *Anderson v. Chicago Brass Co.* 273

15. In an action for the death of a servant, happening while unloading a heavy machine from a freight car, it is error to allow opinion evidence as to whether the manner of moving the machine was proper. Such evidence is *held* to have invaded the province of the jury. *Hamann v. Milwaukee B. Co.* 550

16. Opinion evidence, proper to be given as to the very point the jury is to decide, is confined to cases where such point is clearly within the field of expert evidence and the opinions offered are based on undisputed facts, or assumed facts warranted by the record. *Ibid.*

17. The rule allowing opinion evidence as to whether a particular situation is perilous does not extend beyond those situations where the jury, after having all the facts presented to them as clearly as practicable, cannot form an opinion which is as reliable as that of an expert. *Ibid.*

18. The scope of expert evidence is not restricted to the field of "science, art, or skill," technically speaking, but extends to every subject in respect to which one may derive, by experience, special and peculiar knowledge. *Ibid.*

19. When evidence is excluded because the subject of inquiry is a matter of common knowledge, the real reason for the exclusion is that it is not expert evidence at all. *Ibid.*

20. The question of the admissibility of expert evidence as it arises in practice is in the field of competency, and hence the ruling of the trial court thereon, in any case, should not be disturbed except where it appears to be erroneous. *Ibid.*

Same: Competency of experts.

21. In an action for the death of plaintiff's intestate, caused by the bursting of a wooden tank containing distilling slops, plaintiff interrogated a witness called as an expert as to the liability of lactic acid in the slops percolating through the tank and corroding the iron hoops. *Held*, under the evidence, stated in the opinion, that the witness was not qualified to testify as an expert and that the admission of his testimony was error. *Hupfer v. National Distilling Co.* 306

Weight and sufficiency. See APPEAL, 13-15. ASSOCIATIONS, 3. BROKERS. COMPROMISE AND SETTLEMENT, 3. CORPORATIONS, 6, 7. CRIMINAL LAW, 2-6. DEEDS, 1, 2. EVIDENCE, 4, 5. HOMICIDE, 1. JUDGMENTS, 2. LANDLORD AND TENANT, 2-4. MASTER AND SERVANT, 1-5, 7-11, 24, 25. PATENTS, 2. RAPE, 3-7. STREET RAILWAYS, 1, 2. VENDOR AND PURCHASER. WILLS, 4, 6.

EXCEPTIONS. See APPEAL, 5–8. JURY. TRIAL, 7.

EXCESSIVE DAMAGES. See STREET RAILWAYS, 8.

EXECUTIONS. See CONTEMPT, 5, 6.

EXECUTORS AND ADMINISTRATORS.

Allowance of claims: Presentation: Limitations: Husband and wife. See GIFTS, 2.

The filing of a claim by the administratrix of a deceased wife against the estate of the husband for money loaned by the wife to the husband is not an action between the wife and husband, and does not prevent the operation of sec. 3844, Stats. 1898, that section containing no specific exemption in favor of married women. *Barry v. Minahan,* 570

Actions. See ACTION, 3. LIMITATION OF ACTIONS, 5–8.

Foreign and ancillary administration. See WILLS, 1–3.

Appeal. See APPEAL, 25–31.

EXECUTORY CONTRACTS. See CONTRACTS, 1.

EXEMPLIFIED COPY. See WILLS, 1, 2.

EXPERTS. See EVIDENCE, 10–21.

EXPRESS WARRANTY. See SALES, 3, 4.

FALSE REPRESENTATIONS. See BROKERS, 3. FRAUD. PATENTS, 2–4. TRIAL, 14. VENDOR AND PURCHASER.

FALSE SWEARING. See INSURANCE, 11–14.

FELLOW-SERVANTS. See MASTER AND SERVANT, 18–22. RAILROADS, 1.

FELONIOUSLY. See RAPE, 1.

FILING. See CHATTEL MORTGAGES, 1, 2.

FINAL ORDER. See APPEAL, 4.

FINE. See CONTEMPT, 3–6.

FIRE INSURANCE. See INSURANCE, 11–15.

FIXTURES.

See MECHANICS' LIENS.

1. In determining whether articles in a building are fixtures, three things should be considered: (1) Actual physical annexation to the realty. (2) Application or adaptation to the use or purpose to which the realty is devoted. (3) An intention on the part of the person making the annexation to make a permanent accession to the freehold. *Baringer v. Evenson,* 36

2. In an action by a landlord against a tenant for the value of certain shelving, drawer pulls, counters, screen doors, and a furnace removed by the tenant from the demised premises, on the evidence, stated in the opinion, it is *held* that the question whether the same were fixtures should have been submitted to the jury. *Ibid.*

3. In such case certain of the articles were attached and used in and as forming a part of the store building when the defendant became a tenant. In the absence of any evidence disclosing a different state of facts, such articles are *held* to be the property of the landlord. *Ibid.*

4. An incoming tenant should take care to ascertain that he will have a good title to any fixtures he purchases from the outgoing tenant. *Ibid.*

5. Physical annexation, although always an important consideration, is not the sole or controlling test in determining the question of fixture or no fixture. The question of the intention of the party making the annexation is the principal consideration. *E. M. Fish Co. v. Young,* 149

FORECLOSURE. See ASSISTANCE, WRIT OF. CHATTEL MORTGAGES, 3–9.

FOREIGN CORPORATIONS. See CORPORATIONS, 5–7. PROCESS.

FOREIGN JUDGMENTS. See JUDGMENTS, 3.

FOREIGN WILLS. See WILLS, 1–3.

FOREMAN. See MASTER AND SERVANT, 18–22.

FORFEITURE. See INSURANCE, 11–14, 16–18.

FRANCHISE. See MUNICIPAL CORPORATIONS, 2, 4.

FRAUD.

False representations: Rights of action. See INSURANCE, 11–14. SALES, 1. TRIAL, 14. VENDOR AND PURCHASER.

1. In an action for deceit the sole question is whether the misrepresentation in fact deceived the party involved and materially affected his conduct. Effectiveness of deceit is to be tested by its actual influence on the person deceived, not by its probable weight upon another, and hence, in such action, it is not error to refuse to submit as part of a special verdict a question as to whether the misrepresentations were sufficient to influence the conduct of a person of ordinary intelligence. *Bowe v. Gage,* 245

2. Representations, to be fraudulent, must relate to a present or past state of facts. *J. H. Clark Co. v. Rice,* 451

3. Relief as for deceit cannot be obtained for nonperformance of a promise looking to the future. *Ibid.*

4. A mere expression of opinion or belief as to the value or quantity of an article sold, if so intended and understood, is not a representation of a fact, and, though false, does not amount to fraud. *Ibid.*

5. Whenever there is doubt as to whether a statement is a mere expression of an opinion or a statement of fact the question must be determined by the jury or court. *Ibid.*

6. False representations, to be actionable, must be relied upon by the purchaser, and be of such character and made under such circumstances as to justify the purchaser in relying upon them. *Ibid.*

Same: Evidence. See APPEAL, 15. ASSOCIATIONS, 3. BROKERS, 3. COMPROMISE AND SETTLEMENT, 2, 3. INSURANCE, 11–14. SALES, 1. TRIAL, 14. VENDOR AND PURCHASER.

FRAUDULENT CONVEYANCES. See DEEDS, 2.

GARNISHMENT.

Property subject to garnishment. See ALIENS, 2, 5.

Under subd. 1, sec. 2769, Stats. 1898, no lien is obtained by an attempted garnishment where the fund is represented by a certificate of deposit. *Disconto Gesellschaft v. Umbreit,* 651

GEARING. See MASTER AND SERVANT, 11, 16.

GENERAL CITY CHARTER. See MUNICIPAL CORPORATIONS, 1.

GIFTS.

Inter vivos.

1. Actual delivery of the property is essential to the validity of a gift. The delivery as a gift of the promisor's own note is not a delivery of the property, but a mere promise to deliver it, and not enforceable. *Tyler v. Stitt,* 379

2. Plaintiff filed against the estate of defendant's intestate a promissory note. Under the facts, stated in the opinion, it was *held:*
   (1) The note was a mere promise to make a gift in the future and hence not enforceable against the estate.
   (2) The note being filed as a claim against the estate for a debt supposed to be due from it, the defendant was defending in his representative character as administrator only, the estate being the real defendant.
   (3) Any trust or estoppel which could be invoked against the defendant in respect to such note affected him only as an individual and not as administrator.
   (4) Being sued as administrator in a pure action at law, defendant could not be held as an individual upon an entirely different cause of action in equity. *Ibid.*

GRAND JURY. See LIBEL AND SLANDER.

GUARDIAN AND WARD.

Custody and care of ward's estate.

1. It is the duty of a guardian, as trustee of the funds of his ward, on receiving such funds, to keep them for his ward, and to invest so much of them as is not required for immediate and necessary use as soon as he can do so with reasonable diligence. *Abrams v. United States Fidelity & Guaranty Co.* 579

2. In performing such duty he can employ an attorney to collect the ward's funds, but when the guardian has received them the functions of the attorney are ended, and if the guardian then places the funds in the attorney's hands to invest, the attorney becomes simply an agent to whom the guardian has delegated his duties as trustee. *Ibid.*

3. Where a guardian employed an attorney to collect his ward's estate, and the amounts so collected were represented by checks or drafts payable to the guardian, which the guardian indorsed and handed back to the attorney for investment, and the attorney afterwards defaulted, on an accounting the guardian is properly charged with such amounts. *Ibid.*

4. In such case when the drafts came to the guardian's hands he came into the possession of so much of his ward's estate, and his personal duty to manage that part of the ward's estate then began. *Ibid*

Accounting and settlement. See APPEAL, 19, 31.

5. Where a guardian voluntarily stood *in loco parentis* to his wards and never intended to charge them anything for lodging or personal services, on an accounting neither the guardian nor his surety has any right to credit therefor. *Abrams v. United States Fidelity & Guaranty Co.* 579

Same: Interest.

6. The question as to the time from which a guardian shall be charged with interest on the funds of his ward, lost through the negligence of the guardian, is a matter resting in the sound discretion of the trial court in view of all the facts. *Abrams v. United States Fidelity & Guaranty Co.* 579

7. Where a guardian had neglected his duty as to his ward's funds and made no attempt to invest them, it is no abuse of discretion to charge the guardian with interest thereon, commencing two months from the receipt of part of the funds and three months upon the balance. *Ibid.*

8. In an accounting by a guardian annual rests should be made, the amounts expended for the preceding year deducted, and interest computed on the balance up to the next annual rest; but where the method adopted was more favorable to the guardian, it is not prejudicial error on the guardian's appeal. *Ibid.*

Same: Costs. See COSTS, 1.

Same: Discharge of guardian: Limitation of actions.

9. Under sec. 3968, Stats. 1898, the guardian is discharged, within the meaning of the statute, when the ward attains his majority, and the fact that the same person is also guardian of other minors, although appointed such by the same order, and the performance of his duties secured by the same bond, is no obstacle to such discharge. *Wescott v. Upham,* 590

10. Sec. 3968, Stats. 1898, is peculiar in that it adopts, as a date for the commencement of the limitation period, the discharge of the guardian and fixes an arbitrary term of four years thereafter; and hence, while it may be a preliminary to any right to sue on a guardian's bond that an accounting must be had in the county court and the breach of the bond established, such full accrual of the cause of action is not necessary before the limitation commences to run. *Ibid.*

11. Whether, in view of the possibility that a hearing upon a guardian's account may be protracted, against the control of the minor, to or beyond the period of the limitation provided in sec. 3968, Stats. 1898, there ought to be some exception made so as to assure adequate opportunity to sue thereafter, is a question for the legislature, but in its absence it cannot be construed into the statute by the court. *Ibid.*

12. The provisions of sec. 3968, Stats. 1898, apply to bonds given under sec. 4004, on sale of the ward's real estate, since the words of sec. 3968, "on any bond given by a guardian," are too plain to permit of construction other than according to their literal effect. *Ibid.*

13. Where the operation of sec. 3968, Stats. 1898, allowed a ward only thirty-four days after the termination of the accounting proceedings in which to bring actions against the sureties on the guardian's bond, no question of the reasonableness of the statute is presented under the record. *Ibid.*

14. Under sec. 3968, Stats. 1898, the want of legal capacity to sue refers to some characteristic of the person disqualifying him in some degree from acting freely for the protection of his rights, not to an impediment to the maintenance of the particular cause of action. *Ibid.*

15. Under sec. 3968, Stats. 1898, the settlement of a guardian's accounts before action against the sureties is not a disability attributable to any personal peculiarity of the ward; it is an obstacle to the maintenance of the action applicable to all persons alike, and does not extend to mere incompleteness of the cause of action. *Ibid.*

GUARDS TO MACHINERY. See MASTER AND SERVANT, 9.

GUESTS. See HUSBAND AND WIFE. INNKEEPERS.

HEALTH. See PAUPERS.

HIGHWAYS.

Establishment by statutory proceedings.

1. Highways are only to be laid out when the public good will thereby be promoted, and private considerations or inducements cannot rightly enter into the question in any degree. *State ex rel. Dosch v. Ryan,* 599

2. Bargains with public officers who are exercising the important and sovereign power of laying out highways, and the offer of inducements of any kind tending to influence their free action, are not only void as against public policy, but official action based thereon ceases to be based solely upon the public welfare and becomes tainted with some degree of private interest. *Ibid.*

3. In proceedings before commissioners appointed by the county judge to review the decision of the town supervisors denying an application to lay out a highway, the commissioners met, and two were in favor of laying out the highway and one opposed. D., a person interested in the establishment of the highway, having been called in and asked if he would grade the piece of new road and build a bridge at his own expense, agreed to do so, and gave a bond to the commissioners binding himself to do such acts, conditioned that if he failed to do so the road should not be laid out or opened. Thereupon the commissioners unanimously decided to lay out the highway as prayed, and filed their written decision to that effect, accompanied by the bond. *Held:*

(1) The decision of the commissioners was conclusively shown to have been, in part, based upon the fact that the bond had been given, and was void.

(2) It did not avail the validity of the proceeding that a majority of the commissioners testified that they would have decided to lay out the highway had the bond not been given. *Ibid.*

4. In such situation there is safety only in the entire prohibition of such transactions. *Ibid.*

HOMICIDE.

Evidence: Weight and sufficiency.

1. In case of a prosecution for criminal homicide where the body of the victim was destroyed, it is not necessary to a conviction to establish beyond a reasonable doubt the precise means by which death was produced. *Schwantes v. State.* 160

Trial: Instructions to jury.

2. In respect to whether death was produced by criminal means it is proper to instruct the jury that they are permitted to consider any cause other than that charged, which may in any reasonable probability have acted in the matter, such as suicide or accident, or the act of some person other than the accused. *Ibid.*

HUSBAND AND WIFE.

Contracts between husband and wife. See EXECUTORS AND ADMINISTRATORS. LIMITATION OF ACTIONS, 5–8.

Agency. See WITNESSES, 1.

Coverture: Contracts of wife. See INNKEEPERS, 2, 3.

A contract by a married woman to pay for her board while living with her husband and while she is engaged in no business creates no liability against the wife. *Chickering-Chase Bros. Co. v. White,* 83

IMPEACHMENT. See RAPE, 7. WITNESSES, 4–6.

IMPLIED REPEAL. See STATUTES, 2.

IMPLIED WARRANTY. See SALES, 3, 4.

IMPRISONMENT. See CONTEMPT, 3–6.

INCOMPETENCY. See NEGLIGENCE.

INCORPORATION. See APPEAL, 4. ASSOCIATIONS, 2, 4–7. CERTIORARI, 11. RELIGIOUS SOCIETIES.

IN CUSTODIA LEGIS. See CHATTEL MORTGAGES, 6.

INDEMNITY. See CONTEMPT, 4–6. MUNICIPAL CORPORATIONS, 6.

INDEPENDENT CONTRACTOR. See CONTRACTS, 2.

INDICTMENT AND INFORMATION. See RAPE, 1.

INFANTS. See DIVORCE. EVIDENCE, 14. GUARDIAN AND WARD. LIMITATION OF ACTIONS, 9, 10. MASTER AND SERVANT, 23, 24. TRIAL, 10.

INJUNCTION. See COUNTIES, 1, 2. MUNICIPAL CORPORATIONS, 4–6.

INNKEEPERS.

See HUSBAND AND WIFE.

1. Under sec. 3344, Stats. 1898, giving every innkeeper and boarding-house keeper a lien upon and right to retain possession of the baggage and effects of any guest or boarder for the amount due him, in order that such lien may exist there must be a debt for board due from the boarder to the boarding-house keeper. *Chickering-Chase Bros. Co. v. White,* 83

2. Where a married woman living with her husband came with the husband to a boarding house and engaged board, the indebtedness for the wife's board is the husband's debt, and hence no lien could attach to her separate property which she herself brought to the boarding house. *Ibid.*

3. In such case, even if there had been an express pledge by the wife of her property for the payment of the debt, it would not create a boarding-house keeper's lien under sec. 3344, Stats. 1898, but at best an equitable lien or charge, enforceable by proper action in a court of equity or equitable counterclaim in an action at law. *Ibid.*

IN REM. See PHYSICIANS AND SURGEONS, 3.

INSOLVENCY. See BANKRUPTCY.

INSPECTION. See TRIAL, 3.

INSTRUCTION TO JURY. See APPEAL, 6, 7, 17. BROKERS, 5. COMPROMISE AND SETTLEMENT, 3. CRIMINAL LAW, 7, 8. EVIDENCE, 2, 3. HOMICIDE, 2. INSURANCE, 11, 12. LANDLORD AND TENANT, 4. STREET RAILWAYS, 4–6. TRIAL, 7–14, 16, 22.

INSURANCE.

MUTUAL COMPANIES.

Members: Rights and liabilities. See CONSTITUTIONAL LAW, 12, 13. CORPORATIONS, 3.

1. Under the charter of a mutual insurance company providing, in effect, that one can become a member only by taking out a policy of insurance and that the membership can survive only to the end of the policy period upon which it is based, no one can rightly be treated as a member for any purpose at any time unless he then holds an unexpired policy of insurance. *Huber v. Martin,* 412
2. If the charter of a mutual insurance company contains no provision on the subject, membership commences only with the taking out of a policy and lasts only for the policy period. *Ibid.*
3. As regards rights and remedies, the policy-holders in a mutual insurance company are stockholders therein the same as owners of stock in a stock corporation, there being no charter provision to the contrary. *Ibid.*
4. The interests of policy-holders in a mutual insurance company are twofold, they are both insurers and insured. In respect to the former they are entitled to share in the losses and profits of the business on the basis of a partnership, except so far as the charter or policy contract provides otherwise. *Ibid.*

Same: Title to assets.

5. The title to the property of a mutual insurance corporation is in the company, but the equitable interests therein are vested in the members the same as in case of a stock corporation. While the corporation owns the property the members own the corporation. *Huber v. Martin,* 412
6. For all except corporate purposes, the property of a mutual insurance company, the same as that of any other corporation, belongs to its members whether they are stockholders in the technical sense or in the broader one which includes policy-holders in such a company. *Ibid.*

Same: Surplus: Distribution.

7. It is competent for a mutual insurance corporation, there being no limitation in its charter to the contrary, to make rates for insurance with a view of probably creating a surplus and of subsequently distributing the same to members so far as experience shall show that the same is not needed in the business. *Huber v. Martin,* 412
8. In case of a distribution of the surplus of a mutual insurance company or of its other assets, there being no charter provision to the contrary, existing policy-holders and such only are the legitimate distributees. In the aggregate, they are entitled to the whole. *Ibid.*

Same: Suing in behalf of corporation.

9. Any member of a mutual insurance company suing for himself and others similarly interested, may invoke equity jurisdiction to redress or prevent any wrong injuriously affecting the property rights of the corporation, when its officers will not move appropriately to that end. *Huber v. Martin,* 412

Re-incorporation and re-organization.

10. In case of success, in form, of an attempt to re-organize a mutual insurance company on the stock plan under a law, in terms, authorizing it and the insurance business formerly carried on by the old company being continued ostensibly by the new creation, using the former's assets and good will, if the attempt is fruitless because of the enabling act being void such continued business is to be regarded as really that of the old corporation; as belonging to it. *Huber v. Martin,* 412

FIRE.

Avoidance of policy: Fraud: False swearing.

11. In an action to recover for loss under an insurance policy containing a provision avoiding it for fraud and false swearing, an instruction, stated in the opinion, was given in connection with a question of the special verdict, also stated in the opinion. *Held,* that such instruction, under the circumstances disclosed by the evidence, was not a proper statement of the law, was misleading, and therefore prejudicially erroneous. *Meyer v. Home Ins. Co.* 293

12. In such case the fact that the jury found that the amount of plaintiffs' property was more than the amount of loss does not render the instruction any less prejudicial. *Ibid.*

13. Under a clause in a fire insurance policy providing it should be void for fraud and false swearing, the presence of the words "false swearing" in connection with the word "fraud" indicates that either wilful fraud or false swearing is designed to have the effect of defeating the policy, regardless of the ultimate effect of the false swearing upon either party to the contract. *Ibid.*

14. In such clause the word "fraud" is used in connection with the words "false swearing" to cover frauds otherwise than by false swearing. *Ibid.*

Same: Examination of assured under oath.

15. In an action on fire insurance policies containing a provision that the assured should submit to examinations under oath as often as required, it was *held* there was no violation of such provision of the policies, and no error, predicated on such violation, was committed in failing to hold that the action was prematurely brought. *Meyer v. Home Ins. Co.* 293

LIFE.

Benefit insurance: Prohibited occupations: Forfeiture.

16. One who was not employed or paid compensation as a bartender is not a "saloon bartender" within the calls of a prohibition in that respect in a benefit insurance certificate, although while engaged in his duties as chore boy in a restaurant and saloon he occasionally waited upon customers as an accommodation to his employer. *Stevens v. Modern Woodmen of America,* 606

17. Engaging in an employment or occupation prohibited by the conditions of a contract with a benefit society has reference to the vocation or calling to which the insured devotes himself with some degree of permanency for hire or profit, and does not refer to acts which are simply incidentally connected with a regular employment. *Ibid.*

ACCIDENT.

Liability: Exemptions: Proximate cause.

18. In an action on a policy insuring against the effects of bodily injury caused solely by external, violent, and accidental means, under one exemption from liability contained in the policy it was *held:*

(1) The term "proximately," employed in the contract, must be understood to have been used in its common and accepted meaning, as adopted and approved in the law under like conditions and circumstances.

(2) The jury were warranted in their conclusion that the assured's death resulted proximately and solely from his accidental fall. *Cary v. Preferred Accident Ins. Co.* 67

19. Responsible causation, as applied in the law of insurance, is not dependent on time, distance, or a mere succession of events. *Ibid.*

20. A policy insuring against accidents, exempting the insurer from any liability for any injury "resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled," does not exempt the insurer from liability when accidental abrasion of the skin was the proximate cause of death, although bacterial poisoning intervened. *Ibid.*

21. In such case the policy further exempted from liability for death "resulting either directly or indirectly, wholly or in part, from bodily infirmity or disease of any kind." *Held,* that the exemption did not apply to bodily infirmity or disease the result of accident, and, the facts justifying the conclusion that death resulted from accidental injury, the insurer was liable within the intent and meaning of this provision of the policy. *Ibid.*

INTENT. See FIXTURES, 1, 5. WILLS, 9.

INTEREST. See GUARDIAN AND WARD, 6–8.

INTERLOCUTORY JUDGMENTS. See APPEAL, 3. JUDGMENTS, 1, 2.

INTERNAL REVENUE. See EVIDENCE, 8, 9.

INTERSECTIONS. See EMINENT DOMAIN.

INTERSTATE COMITY. See ALIENS, 3, 4.

INTERVENTION. See ALIENS, 2, 5.

INVESTMENTS. See GUARDIAN AND WARD, 1–8.

JOINDER OF CAUSES OF ACTION. See ACTION, 2, 3.

JUDGMENTS.

Interlocutory. See APPEAL, 3.

1. Under sec. 2883, Stats. 1898, an interlocutory judgment substantially settling all the rights of the parties except those expressly reserved for further decision, having been affirmed by the supreme court with certain modifications, is conclusive, except as to those matters reserved. *Gates v. Paul,* 628

2. In an action for the dissolution of a partnership and an accounting, an interlocutory judgment was entered reserving certain matters for further decision. Thereafter the matters reserved were tried by a referee and the findings of the referee are *held* supported by a preponderance of the evidence. *Ibid.*

By default. See DISCOVERY, 2.

On appeal. See APPEAL, 20–24.

Amendment and modification of judgments. See COURTS, 5. DIVORCE.

Conclusiveness of adjudication. See ALIENS, 5, 6. COURTS, 5. JUDGMENTS, 1.

Actions on judgments: Foreign judgments. See WILLS, 1–3.

3. In order to entitle the records and judicial proceedings of the courts of other states and countries to the faith and credit required by constitutional mandate, it must appear, in the manner prescribed by law, that the court rendering the same had jurisdiction. *In re Box's Will,* 264

JUDICIAL AUTHORITY. See CONSTITUTIONAL LAW, 5. PHYSICIANS AND SURGEONS, 4.

JUDICIAL DISCRETION. See CERTIORARI, 7.

JUDICIAL POWER. See CONSTITUTIONAL LAW, 4.

JUDICIAL PROCEEDINGS. See LIBEL AND SLANDER.

JURISDICTION. See ALIENS. CERTIORARI. COSTS, 6. COURTS. JUDGMENTS, 3. PHYSICIANS AND SURGEONS. 1, 3, 5. PROCESS. WILLS, 1–3.

JURISDICTIONAL ERRORS. See CERTIORARI, 1, 4–6, 8, 10. PHYSICIANS AND SURGEONS, 3.

JURY.

See NEW TRIAL, 1, 2. WILLS, 7.

If an alien serves on a jury without objection being seasonably made and insisted upon, his incompetency is thereby waived whether the case is civil or criminal. *Schwantes v. State,* 160

LACHES. See APPEAL, 26–29. ASSISTANCE, WRIT OF, 5.

LAND CONTRACT. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Fixtures. See FIXTURES, 1–4.

Eviction.

1. Where a tenant asserts eviction from the rented premises, actual expulsion is not necessary, but any act of the landlord or of any one who acts under authority or legal right given him by the landlord, which so disturbs the tenant's enjoyment of the premises as to render them unfit for occupancy for the purposes for which they are leased, is an eviction, and, whenever eviction takes place, the tenant is released from the obligation under the lease to pay rent accruing thereafter. *Wade v. Herndl,* 544

2. In an action for rent, under the facts, stated in the opinion, the defendant was *held* evicted from the rented premises. *Ibid.*

3. In such case the shaking and vibration complained of was *held* necessarily within the contemplation of the parties when the lease to another tenant was made. *Ibid.*

4. In such case it further appeared that upon the complaint of the tenant the landlord investigated the matters, and, after observing from the tenant's room the effect of the testing of automobiles, took no steps to prohibit the automobile company from continuing to make the tests. *Held*, that the court did not err in ruling that the acts of those in charge of the automobile business were within the rights granted them by the landlord under their lease, and that it was not error to instruct the jury as stated in the opinion. *Ibid.*

Same: Damages.

5. Where a landlord permits a tenant in his building to conduct business so as to result in the eviction of another tenant, expenses incurred by the tenant in removing from the building, and loss of time in his employment on account of such removal, are *held* proper elements of recovery resulting from the breach of the landlord's obligation. *Wade v. Herndl*, 544

6. When a lease exempts the landlord from liability for damage occasioned by the "acts or neglect of cotenants or other occupants," such exemption does not apply to the acts or neglect of cotenants or occupants authorized or committed under any right given by the landlord. *Ibid.*

LATENT DEFECTS. See MASTER AND SERVANT, 13.

LEGISLATIVE AUTHORITY. See PHYSICIANS AND SURGEONS, 4, 6.

LEGISLATIVE DISCRETION. See CERTIORARI, 7. CONSTITUTIONAL LAW, 1, 2.

LEGISLATURE. See CONSTITUTIONAL LAW, 1–3, 9–11. CORPORATIONS, 1–3. GUARDIAN AND WARD, 11. MUNICIPAL CORPORATIONS, 14.

LIBEL AND SLANDER.

Cause of action: Privileged occasion.

1. No cause of action for slander lies for statements and communications made to a grand jury in the course of their proceedings or to the district attorney and his assistants in their official capacities. *Schultz v. Strauss*, 325

2. Words spoken in judicial proceedings, though they are such as impute a crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. *Ibid.*

3. Proceedings of a grand jury are judicial proceedings. *Ibid.*

4. Exemption from liability for words spoken on a privileged occasion is not the same privilege recognized in the law as pertaining to confidential communications, but they are privileged upon the ground that they furnish no ground of action for the alleged injury. *Ibid.*

5. In an action for slander for statements made to the grand jury in the course of their proceedings and to the district attorney in his official capacity, the very nature of the complaint shows that the statements made were pertinent and material to the subject under consideration by the grand jury, and that they were communicated to the grand jury in a judicial proceeding *Ibid.*

6. Such communications are made on a "privileged occasion," and are therefore not actionable. *Ibid.*

7. Where plaintiff has no cause of action for slander because the words spoken were communicated to the grand jury in the course of their proceedings, or to the district attorney in his official capacity, it is not error for the circuit court to restrain a court commissioner from punishing for contempt a defendant who refused to answer questions propounded to him touching such communications while being examined as an adverse party under sec. 4096, Stats. 1898. *Ibid.*

LICENSE. See CERTIORARI, 6. PHYSICIANS AND SURGEONS, 1, 8, 14.

LIENS.
Of garnishment. See ALIENS, 2, 5, 6. GARNISHMENT.
Of innkeepers. See INNKEEPERS.
Of mechanics. See MECHANICS' LIENS.

LIFE INSURANCE. See INSURANCE, 16, 17.

LIMITATION OF ACTIONS.

Statutes of limitation: Nature and construction. See MUNICIPAL CORPORATIONS, 16.

1. The notice required by subd. 5, sec. 4222, Stats. 1898, is not a limitation upon the time for commencement of actions, but a condition or limitation upon the right to maintain actions unless such notice shall be served within one year after the happening of the event causing damage, or unless such notice shall become unnecessary by the actual bringing of the action within such year as provided by ch. 307, Laws of 1899. *Hoffmann v. Milwaukee Electric R. & L. Co.* 76

2. Subd. 5, sec. 4222, Stats. 1898, as to actions accruing after its passage, is not obnoxious to any constitutional provision. *Ibid.*

Computation of period of limitation: Accrual of right of action. See GUARDIAN AND WARD, 9–15. TAX TITLES, 2.

3. A cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it. *Barry v. Minahan,* 570

4. A cause of action to recover for money loaned, payable upon demand, accrues at the time of the loan. *Ibid.*

5. Where a wife, one year prior to her death, loaned her husband money payable on demand, her rights thereunder against the husband accrued prior to her death and passed to her estate as a valid and existing cause of action. *Ibid.*

6. In such case, the husband having died subsequent to the death of his wife, the estate of the wife is "a creditor of" and "a person having a claim against" his estate, within the calls of the statutes governing the administration of estates of decedents. *Ibid.*

7. In such case the representative of the wife's estate having failed to file such claim against the husband's estate for more than two years after the time limited by the proper county court under sec. 3840, Stats. 1898, the claim is barred under the provisions of sec. 3844, Stats. 1898. *Ibid.*

8. Such bar is not affected by the fact that there has been an unsuccessful attempt, by a son of the wife, to have a trust de-

clared as to the same claim for the amount thereof against the husband's estate, which was defeated on the ground that no trust existed, although the son, as her heir, might profit by the recovery, since that was a different cause of action and prosecuted in a different right. *Ibid.*

Same: Personal disabilities and privileges: Minors.

9. Subd. 5, sec. 4222, Stats. 1898, contains no exception in favor of minors, and sec. 4233, while extending the time within which a minor may commence an action, plainly exempts minors from the operation of the statute limiting the *time* for commencement of actions only, and has no reference to the statute providing for the service of notice. Hence, where a minor failed for one year after an injury causing damage to either give the required notice or bring his action, an action subsequently brought cannot be maintained. *Hoffmann v. Milwaukee Electric R. & L. Co.* 76

Same: Performance of condition: Notice.

10. Under subd. 5, sec. 4222, Stats. 1898, it is sufficient if the notice show that it is given in behalf of the party who brings the suit, and, if in behalf of a minor, the notice may be given by his father, the natural guardian. *Ibid.*

Same: Coverture. See EXECUTORS AND ADMINISTRATORS.

LIQUIDATED DAMAGES. See CHATTEL MORTGAGES, 7.

LIS PENDENS. See ASSISTANCE, WRIT OF, 1, 2.

LOCAL LAWS. See CONSTITUTIONAL LAW, 9, 10.

LOGS AND TIMBER. See DEEDS, 3.

MACHINERY. See EVIDENCE, 1, 14, 15. LIMITATION OF ACTIONS, 1, 9, 10. MASTER AND SERVANT, 2–16. TRIAL, 3, 6, 10, 11, 15, 17, 18.

MANDAMUS. See ACTION, 1. CRIMINAL LAW, 1.

MANDATORY STATUTES. See COUNTIES, 2, 3.

MAPS. See APPEAL, 16.

MARKET VALUE. See DAMAGES, 1.

MARRIED WOMEN. See EXECUTORS AND ADMINISTRATORS. HUSBAND AND WIFE. INNKEEPERS, 2, 3. LIMITATION OF ACTIONS, 5–8.

MASTER AND SERVANT.

Master's liability for injuries to servant: Nature and extent.

1. In an action for the negligent killing of a servant, under the evidence, stated in the opinion, the jury is *held* to have had nothing to guide it except merest conjecture as to how the accident happened, and that therefore there was no efficient basis for a verdict. *Hamann v. Milwaukee Bridge Co.* 550

Same: Machinery and appliances. See EVIDENCE, 1, 14, 15. STREET RAILWAYS, 2–7. TRIAL, 1, 3, 6, 10, 11, 15, 17, 18.

2. In an action for personal injuries to a servant, evidence of abnormal action of a machine can only be the basis of an inference tending to show an insufficiency in the construction and repair of the machine as the producing cause of the injury, which is conclusively rebutted by evidence showing that the machine was free from all discoverable defects, and hence, on such evidence alone, no grounds exist on which the jury can find that any defect existed in the machine which the master in

the exercise of ordinary care ought to have discovered. *Montanye v. Northern Electrical Mfg. Co.* 22

3. Where evidence of alleged defects in a machine would not reasonably admit of an inference that such defects caused the abnormal action of the machine, it is error to refuse a requested instruction, in substance, that the evidence bearing on such defects was not sufficient to sustain a finding that the machine was defective, and that no want of ordinary care could be imputed to defendant with respect thereto as the cause of the injury. *Ibid.*

4. Where it is made to appear that the abnormal action of a machine, in the operation of which a servant was injured, might result from a specific defect, and the evidence on the subject is conflicting, the court should submit to the jury the question of the master's negligence on that ground. *Ibid.*

5. In an action for personal injuries received in operating a machine it is not error to refuse to submit, as part of a special verdict, questions covering different phases of the evidence concerning the nature of the defects, if the machine was found defective in construction or repair, since they required the jury, in answering the general and proper questions respecting the alleged negligence of the defendant, to state the specific grounds for their findings. *Ibid.*

6. A master's duty to a servant requires that he exercise reasonable care in furnishing reasonably safe instruments and that he exercise a like degree of care in making repairs. *Ibid.*

7. Under the facts, stated in the opinion, plaintiff did not assume the risk of the negligence causing her injury. *Van de Bogart v. Marinette & M. P. Co.* 104

8. In such case warning of danger of injury to the servant's fingers from knives held onto a shaft by set-screws is *held* insufficient to apprise plaintiff of the danger of coming in contact with the set-screws. *Ibid.*

9. In an action for personal injuries received by a servant in feeding brass sheets into a rolling machine, the negligence alleged was (1) in not providing the machine with a guard, and (2) in not warning the plaintiff of the danger resulting from sharp slivers of brass which occasionally formed on the sides of the sheets. Under the evidence, stated in the opinion, *held:*

(1) The court rightly struck out the evidence as to the guard and eliminated that question from the case.

(2) As to the failure to warn, there was evidence from which the jury might find negligence on the part of defendant.

(3) Assumption of risk as matter of law was not shown.

(4) A motion for nonsuit was properly overruled. *Anderson v. Chicago Brass Co.* 273

10. In an action for personal injuries received by a servant from machinery, while on many questions there was substantial conflict, and what might be deemed a preponderance of the evidence against the verdict, it is *held* that there was credible evidence from which the jury might have reached their conclusions expressed in the special verdict. *Stork v. Charles Stolper Cooperage Co.* 318

11. In an action for personal injuries to a servant, under the facts, stated in the opinion, the jury might have believed that an exposed gearing was an act of negligence on the part of the

defendant, and that it was the proximate cause within the definition given by the court. *Ibid.*

12. In such case the actual causal relation between the defect in a wrench and the injury cannot be said to exist as matter of law, although it might be found as a fact that one supplying such a defective wrench should, as an ordinarily prudent and intelligent man, anticipate the likelihood that it would be used in such way as to cause injury. *Ibid.*

Same: Simple tools: Monkey wrench.

13. Generally speaking, in case of simple tools no liability rests on the master for the ordinary perils resulting from their use, nor for those latent and usual defects or weaknesses which, by reason of the common, usual character of the appliance, are presumed to be known to all men alike, but such exemption is based on the condition that the defect and peril are such that no superiority of knowledge of the master over the employee exists or can be presumed. *Stork v. Charles Stolper Cooperage Co.* 318

14. As to simple tools and appliances the exemption of the master from the duty to inspect to ascertain the development of defects and disrepair in the course of their use is based upon the assumption that such conditions are as much within the observation, if not more so, of the employee as of the master. *Ibid.*

15. Such exemptions from liability are not in denial of the general underlying principle of the law of negligence that one who knowingly exposes another to likelihood of injury is liable therefor, in the absence of consent by such other or of contributory negligence. *Ibid.*

16. In an action for personal injuries to a servant it appeared, among other things, that plaintiff was injured while using a monkey wrench. Under the facts, stated in the opinion, it was *held* that the jury might have considered it within the realm of ordinary expectation that, when so used, the jaws of the wrench would be likely to part, allow the wrench to slip, and the hand of plaintiff come in contact with gearing to his hurt, and hence it cannot be said, as a matter of law, that there was no evidence to support liability for the injury so occurring. *Ibid.*

Same: Safe place to work.

17. In the removal as in the original erection and construction of buildings, the rule that the master must furnish a safe place to work has very limited application. *Walaszewski v. Schoknecht,* 376

Warning and instructing servant. See MASTER AND SERVANT, 7–9.

Same: Fellow-servants. See RAILROADS, 1.

18. A mere foreman engaged with a crew of assistants, supplied with suitable material and appliances, performing a mere detail of the master's business—removing a machine from a car to the factory,—is a fellow-servant of the members of the crew, and the master is not liable for his fault in failing to choose a proper plan for the removal of the machine, or in omitting to exercise due care to inform his assistants of the danger of the operation. *Hamann v. Milwaukee Bridge Co.* 550

19. In an action against a master for the negligent killing of an employee the evidence was *held* insufficient to show that the fore-

man was incompetent for the work or that the master was negligent in placing the foreman in charge of the work. *Ibid.*

20. One in charge of the entire business of a master as general manager is a vice-principal. *Ibid.*

21. Where, prior to an accident causing the death of a servant, a general manager of a master arrived on the ground while servants were employed in unloading a heavy machine from a freight car according to plans formulated by a foreman in charge, and assumed charge of the work, the master is chargeable with his knowledge and approval of the manner the work was done the same as if the manager had laid out the plan for the work at the outset, and cannot escape responsibility for what occurred upon the plea that the negligence was that of a foreman—a fellow-servant. *Ibid.*

22. In such case the general manager, being chargeable with superior knowledge, when he saw the impropriety of moving the machine without some efficient means to insure against the tipping over which caused the servant's death, should either have stopped further progress until the proper remedy was applied, or have notified the servant of the danger, and, failing so to do, the question of whether there was actionable fault in those regards, or whether such danger as existed in the manner of doing the work adopted was open and obvious to an ordinary man, so that the servant and the master stood on the same plane, were questions for the jury. *Ibid.*

Same: Risks assumed by servant. See MASTER AND SERVANT, 7-9. TRIAL, 11.

23. The rule that knowledge of all obvious dangers is imputed to an adult servant and he assumes all risks incident to them applies to minors in so far as their age, intelligence, discretion, and judgment enable them to comprehend and appreciate such dangers. *Van de Bogart v. Marinette & M. P. Co.* 104

24. In an action for personal injuries to a fifteen-year-old girl from machinery, in the absence of showing that she in fact knew of the danger which caused the injuries and in view of her age, intelligence, experience, discretion, and judgment, as shown by the evidence, stated in the opinion, it cannot be said, as matter of law, that she ought to have discovered and understood such danger. *Ibid.*

25. Plaintiff, a man sixty-four years of age and of ordinary intelligence, while engaged as a workman in taking down a building, was injured by a board knocked off the building by a workman of an independent contractor. *Held*, that the dangers of the work plaintiff was doing were open and obvious, and hence plaintiff assumed the risk of the accident which happened. *Walaszewski v. Schoknecht,* 376

Contributory negligence. See TRIAL, 11.

MAXIMS.

Ita lex scripta est, 134.

MEASURE OF DAMAGES. See DAMAGES. STREET RAILWAYS, 7, 8.

MECHANICS' LIENS.

Extent of lien: "Appurtenances."

Where the owner of a house orders window screens to be manufactured and fitted to his house, though detachable for con-

venience during the winter months, the intention is unquestionably to permanently increase the comfort of the house and its desirability for residence purposes, and, under subd. 1, sec. 3314, Stats. 1898, such screens are clearly included within the term "appurtenance." *E. M. Fish Co. v. Young,* 149

MEMBERS. See ASSOCIATIONS. CORPORATIONS, 4. INSURANCE, 1–10.

MENTAL CONDITION. See APPEAL, 9. EVIDENCE, 4, 5. RAPE, 6, 7. WILLS, 4.

MINORS. See DIVORCE. EVIDENCE, 14. GUARDIAN AND WARD. LIMITATION OF ACTIONS, 9, 10. MASTER AND SERVANT, 23, 24. TRIAL, 10.

MORTGAGES.

Transfer of property mortgaged: Assumption of debt.

1. Where a vendee of lands, at the time of bargaining for the premises, was given the option to buy the premises subject to a mortgage, in that case assuming the debt, or to buy clear of the mortgage upon the payment of the entire sale price to the vendor, and the vendee elected to do the latter, the vendee, as between himself and his vendor, does not become liable for the mortgage debt. *Marling v. Nommensen,* 363

Payment and satisfaction. See BILLS AND NOTES, 3. ESTOPPEL, 3–5.

2. The rule that the maker of a negotiable promissory note can satisfy it only by payment to the owner at the time or to such owner's authorized agent seems to be without applicability to defeat effectiveness of payment to the original mortgagee, as against an unknown assignee, where other than negotiable instruments are involved. *Marling v. Nommensen,* 363

Foreclosure. See ASSISTANCE, WRIT OF.

MUNICIPAL BONDS. See COUNTIES.

MUNICIPAL CORPORATIONS.

Incorporation. See APPEAL, 4.

General city charter: Adoption of part: Pro tanto amendment of special charter.

1. Adoption by a city existing under a special charter of a part of the general charter, *pro tanto* amends the former and renders it to that extent subject to further amendment by legislative action alone to change the part so adopted. *Hay v. Baraboo,* 1

Waterworks: Acquisition: Arbitration.

2. Where a city, pursuant to the terms of a franchise under which a corporation was operating a system of waterworks therein permitting it to acquire the waterworks plant on payment of its value as determined by arbitration, had instituted proceedings for arbitration, the proceedings are simply an assertion of a right claimed under the franchise, which, if legal, is as effectual and as valid a claim before the arbitration as subsequent thereto. *Eau Claire Water Co. v. Eau Claire,* 154

3. Such arbitration does not create a cloud on the water company's title and thereby invade its right to the enjoyment of its property. *Ibid.*

4. While such arbitration would compel the water company to participate in the proceedings to bring about a correct valuation

and require it to devote time and attention to the accomplishment of such a result, yet the annoyance incident to the determination of the rights of the parties under the franchise in no sense causes irreparable injury, nor is it a ground for equitable relief by injunction. *Ibid.*

5. While the water company may incur expense in connection with such arbitration, it is necessarily such as can be readily measured by a pecuniary standard and adequately compensated, and hence furnishes no ground for a temporary injunction. *Ibid.*

6. In such case, however, the city should be restrained from proceeding with the arbitration unless it gives an undertaking with sufficient sureties, in a sum specified by the court, to indemnify the water company for the payment of all reasonable expenses incurred by it in such arbitration. *Ibid.*

Injuries from defective sidewalks: Primary liability of lotowner: Charter provisions.

7. A city charter provision making it the duty of the owners or occupants of premises in front of which sidewalks are located to keep such walks in repair or pay the expenses incurred by the municipality in doing so, does not impliedly make such owners or occupants liable to travelers for injuries occasioned by the walks being out of repair. *Hay v. Baraboo,* 1

8. If, in addition to the duty mentioned in the foregoing paragraph, the charter provides that in case of an injury to person or property by reason of any defect in a sidewalk for which the city would be liable, arising from or produced by the wrong, default, or negligence of any person other than the city, the guilty person shall be primarily liable therefor, and the city shall not be liable therefor in advance of the exhaustion by the injured person of all legal remedies to enforce the private liability, such liability is not deemed to be one of the character of that created by sec. 1339, Stats. 1898, but to be one grounded on common-law principles and so existing independently of statute. *Ibid.*

9. Charter provisions of the sort mentioned in paragraphs 7 and 8 aforesaid do not give rise to any liability either public or private to one injured by reason of a defective sidewalk. Responsibility for the results to person or property from faulty construction of sidewalks or want of repair thereof rests wholly on sec. 1339, Stats. 1898, while responsibility for the results to person or property of active wrongdoing creating a nuisance rests on the common law. Such provisions as those mentioned in paragraph 8 deal with the latter. *Ibid.*

10. A provision such as that mentioned in paragraph 8, given effect broadly, would materially modify sec. 1339, Stats. 1898. It should be strictly construed, first, because it would operate to vary the common law as to personal liability; second, it would to some extent repeal sec. 1339, Stats. 1898. *Ibid.*

11. Nothing short of language unmistakably creating a liability of the owner or occupant of premises, in front of which a sidewalk is located, for damages to person or property caused by the insufficiency of such walk, and making such liability supersede to any extent that of the city under sec. 1339, Stats. 1898, can legitimately be given that effect. *Ibid.*

12. The last foregoing rule is satisfied by provisions in the charter of the city of Fond du Lac, treated in *Hiner v. Fond du Lac,*

71 Wis. 74, and similar cases, but not by provisions in the charter of the city of Janesville, treated in *Selleck v. Tallman*, 93 Wis. 246, and similar cases. *Ibid.*

Same: Notice of injury.

13. The notice required by sec. 1339, Stats. 1898, to be given the municipality in case of injury to a person by reason of want of repair of a sidewalk is a requisite to the creation of a right to compensation for injury. *Hay v. Baraboo*, 1

14. A charter provision prohibiting the enforcement of such a right as that mentioned in paragraph 13, except by presentation of the claim to the city council, and in case of adverse action an appeal to the circuit court, regulates the remedy, and is permissible under the rule that the legislature may take away the ordinary remedy for the enforcement of a right so long as it affords another which is adequate. *Ibid.*

15. A charter provision, in addition to the one regulating the remedy, that no action shall be maintained against the city to enforce any tortious liability, unless a notice in writing signed by the person injured, or claiming to be injured, of the wrong and circumstances thereof and amount of damages claimed, shall be presented to the council within ninety days after the occurrence creating the damage, bears on the remedy and is a statute of limitations. *Ibid.*

16. Provisions such as are mentioned in the thirteenth, fourteenth, and fifteenth paragraphs constitute a complete system as to statutory liability. One is essential to the right. The other relates to the procedure for the enforcement of the right. The third fixes the time within which the remedy is available, and at the expiration thereof, in legal effect, extinguishes the right. *Ibid.*

Dissolution. See CORPORATIONS, 4.

MUTUAL INSURANCE CORPORATIONS. See CONSTITUTIONAL LAW, 12, 13. CORPORATIONS, 3. INSURANCE, 1–10.

MUTUALITY. See CONTRACTS, 3.

NAME. See ASSOCIATIONS, 4.

NECESSARY PARTIES. See CERTIORARI, 5.

NEGLIGENCE.

Acts and omissions: Personal conduct. See ESTOPPEL, 2–5. EVIDENCE, 21. GUARDIAN AND WARD, 1–4, 6, 7. MASTER AND SERVANT, 1. MUNICIPAL CORPORATIONS, 7–16. RAILROADS. STREET RAILWAYS. TRIAL, 1, 3, 6, 10, 11, 15, 17, 18.

Incompetence, in the law of negligence, means want of ability suitable to the task, either as regards natural qualities or experience, or deficiency of disposition to use one's abilities and experience properly. *Hamann v. Milwaukee Bridge Co.* 550

Same: Fellow-servant. See MASTER AND SERVANT, 18–22.

Same: Machinery and dangerous substances. See EVIDENCE, 1, 14, 15. MASTER AND SERVANT, 2–16.

Same: Safe place to work. See MASTER AND SERVANT, 17.

Proximate cause. See MASTER AND SERVANT, 11, 12.

Contributory negligence. See TRIAL, 11.

Assumption of risk. See MASTER AND SERVANT, 23–25. TRIAL, 11.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. GARNISHMENT. GIFTS. MORTGAGES, 2. PATENTS, 2-4. TRIAL, 12-14.

NEWSPAPERS. See PATENTS, 4.

NEW TRIAL.

Grounds: Errors and irregularities. See APPEAL, 20-24.

Same: Misconduct affecting the jury.

1. A verdict cannot stand where the jury have been subjected to any statements or directions naturally tending to coerce or threaten them to agreement either way, or to any agreement at all, unless it be clearly shown that no influence was thereby exerted. *Brown v. State,* 193
2. Under the facts stated in the opinion, an officer's warning to the jury that they would be locked up for the night unless they agreed very soon, is *held* both threatening and coercive, and as naturally tending to induce the jurymen to surrender their opinions. *Ibid.*

Same: Verdict contrary to evidence. See RAPE, 5.

Same: Costs.

3. Where it is apparent from an order granting a new trial that the trial judge was of the opinion that the verdict was contrary to the evidence, and there is evidence strongly tending to show that a note sued on was without consideration and never delivered, the order is one which the lower court has a right, in its discretion, to make, and will not be disturbed unless it clearly appears that there was an abuse of discretion. *Godfrey v. Godfrey,* 47
4. While, on a motion for a new trial, the trial court has some discretion in the matter of costs, where a new trial is ordered on the ground that the verdict is contrary to the evidence it should be granted only on terms. *Ibid.*
5. In this case, on the record, it is *held* that the new trial was granted because the verdict was contrary to the evidence; that there was nothing indicating that the trial court regarded the verdict as perverse, and hence that reasonable terms should have been imposed. *Ibid.*
6. MARSHALL, J. (dissenting), is of the opinion that the verdict was perverse, and hence that a new trial should have been granted without terms. *Ibid.*

Same: Newly-discovered evidence.

7. After a will had been admitted to probate the contestants made a motion for a new trial on the ground of newly-discovered evidence. *Held,* under the evidence, stated in the opinion, that the motion for a new trial was properly denied, and, if a new trial was granted, such evidence would be inadmissible. *Mueller v. Pew,* 288
8. In such case there was also an affidavit of an employee of one of the contestants to the effect that, the morning after the death of testator, he saw proponent tear up a typewritten paper, and heard her say: "This is the last one. Now let them look if they want to." This testimony was thoroughly contradicted, both by direct evidence and by circumstances, and the employee's character was shown to be such as to entitle his state-

ments to little weight. *Held*, in the absence of very much more direct evidence of the existence of a later will, that it could not be established by such testimony. *Ibid.*

NONSUIT. See BROKERS, 2. MASTER AND SERVANT, 9.

NOTICE. See APPEAL, 29. ASSISTANCE, WRIT OF, 1, 2. BANKRUPTCY. CHATTEL MORTGAGES, 3–7. ESTOPPEL, 2–5. LIMITATION OF ACTIONS, 1, 9, 10. MUNICIPAL CORPORATIONS, 13–16. PHYSICIANS AND SURGEONS, 7.

NUISANCE. See MUNICIPAL CORPORATIONS, 9.

OFFICERS.

See DISCOVERY, 3. HIGHWAYS, 2, 3. INSURANCE, 9.

The ordinary meaning of "state officer" is head of a state department, such as governor, secretary of state, and the like. It should be thus restricted when used without circumstances indicating any other intent. *State ex rel. Milwaukee Medical College v. Chittenden*, 468

OPINION EVIDENCE. See EVIDENCE, 10–21.

ORDERS. See APPEAL, 1–4.

PAROL EVIDENCE. See CHATTEL MORTGAGES, 2.

PARTIES. See ACTION, 3. ALIENS, 1–4. ASSISTANCE, WRIT OF, 2–4, 6. CERTIORARI, 1, 3–5. DISCOVERY. GIFTS, 2. RAPE, 7.

PARTNERSHIP. See INSURANCE, 4. JUDGMENTS, 2.

PATENTS AND PATENT RIGHTS.

Regulation of dealings in patent rights. See TRIAL, 2, 12–14.

1. Ch. 438, Laws of 1903, amending ch. 268, Laws of 1901, is an invasion of sec. 4898, R. S. of U. S., and unconstitutional and void because in conflict with sec. 8, art. I, Const. of U. S. *J. H. Clark Co. v. Rice*, 451

2. In an action on a note given for the purchase of a patent right, one defense was that defendant was induced to give the note by the false and fraudulent representations of plaintiff. The special verdict, as originally submitted to the jury, contained the question: "Did the defendant, at the time he talked with Mr. R. [one of plaintiff's officers] relative to an extension of the time of payment of the note, have knowledge of all facts and circumstances which he now claims to know?" which, before rendition of the verdict, was withdrawn from the jury. The evidence, stated in the opinion, was not undisputed. *Held*, that the court's ruling was error. *Ibid.*

3. In an action on a note given for a patent right, in which the defendant pleaded as a defense the false and fraudulent representations of the plaintiff inducing the purchase of the patent right, statements made on the part of plaintiff to other persons, not in the presence or hearing of defendant, some of them long after the execution of the note, are not admissible to prove bad faith and an actual intent to deceive on the part of the plaintiff. *Ibid.*

4. Newspaper articles, circulars, pamphlets, etc., many of them never seen by defendant, and some of them not in print until after the making of the note, are likewise inadmissible. *Ibid.*

PAUPERS.

1. Plaintiff being possessed of a boarding house and business, one of her patrons was taken sick with smallpox, and herself, family, and other boarders quarantined by the city authorities. Shortly thereafter the city authorities refused to further care for the patient, and turned the matter over to the duly authorized poor agent of the defendant county, who continued the quarantine. Plaintiff brought this action for the value of her property used up or rendered worthless, the value of the use of her premises and belongings, injury to her health and that of her daughter, and the value of services rendered in taking care of the sick. *Held:*

(1) Principles of natural justice, of themselves, are insufficient to create such a liability against the county.

(2) There is no common-law liability of counties to care for the poor, or to conserve the public welfare by preventing the spread of contagious or other diseases, or caring for those affected therewith.

(3) Counties have no power whatever except such as is derived from the written law.

(4) There is no statute imposing the duty on counties, primarily or otherwise, to take charge of and care for persons because of their being afflicted with contagious diseases.

(5) No cause of action existed in favor of plaintiff. *Martin v. Fond du Lac Co.* 586

2. Under sec. 1416, Stats. 1898, there is no other public liability than that of the particular municipality where the necessity arises for action in caring for persons so affected with a contagious disease. *Ibid.*

3. The term "proper board of health" as used in sec. 1416, Stats. 1898, plainly restricts the liability to the particular municipality where the person suffering from a contagious disease is located, since there is no statute providing for county boards of health. *Ibid.*

PAYMENT. See BILLS AND NOTES. MORTGAGES, 2. PRINCIPAL AND SURETY, 2–4.

PENALTY. See CONTEMPT, 3.

PERSONAL INJURY. See EVIDENCE, 1, 14, 15, 21. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 7–16. RAILROADS. STREET RAILWAYS. TRIAL, 1, 3, 6, 10, 11, 15, 17, 18.

PHOTOGRAPHS. See EVIDENCE, 7.

PHYSICIANS AND SURGEONS.

See CERTIORARI, 6.

Dentistry: State board: Adjudication as to status of dental colleges.

1. It is proper, in administering the law regulating the practice of dentistry, for the official board, of its own motion, or on petition of a college of which it has jurisdiction, to adjudicate its status as regards reputability. *State ex rel. Milwaukee Medical College v. Chittenden,* 468

2. The adjudicated status of a college is presumed to continue till the presumption shall have been reasonably rebutted, under the general rule that "when the existence of a person, a personal re-

lation, or a state of things is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised, from the nature of the subject in question." *Ibid.*

3. If the status of a dental college is adjudicated in an action *in rem*, whether the proceeding is solely against the *res* or one to pass upon an application for a license and against the *res* as well, such college may properly be accorded the *certiorari* remedy to test the decision for jurisdictional error, either as to the subject matter or excess of jurisdiction. *Ibid.*

4. The authority of the board, under the law regulating dentistry, to pass upon the reputability of colleges, is neither legislative nor judicial but is *quasi*-judicial: that species of authority commonly intrusted to individuals, boards, or commissions to determine matters of fact when that is essential to the performance of administrative duties. *Ibid.*

5. When the condition of a person, the thing denominated status, is a matter of public concern, it is a proper object to be dealt with and settled by a direct proceeding in any tribunal having jurisdiction of the *res*, and that applies to the status of a college under the system of legislative regulation of the profession of dentistry. *Ibid.*

6. The law governing the board of dental examiners does not confer thereon power to do more than to execute the legislative will along lines expressed by it with reasonable definiteness. The mere making of reasonable rules to be followed in performing administrative duties, is not the exercise of legislative authority. *Ibid.*

7. The implied grant of authority to the dental board to determine the status of a dental college, no reference being made to the subject of notice thereto and opportunity to be heard, does not suggest power to proceed in that regard without such notice: on the contrary, it implies action in accordance with the fundamental principles of justice. *Ibid.*

8. The feature of the dental law prescribing conditions upon which a diploma from a dental college may be received as sufficient evidence of qualifications to permit of a license to practice dentistry being issued to the holder thereof without examination as to his fitness, does not deny or prejudice the right to study for such profession. *Ibid.*

9. The dental board, in passing upon a question within its jurisdiction to solve by the exercise of judgment, is supreme, so long as it proceeds to a reasonable conclusion upon evidence bearing on such question. *Ibid.*

10. The meaning of the word "reputable" as used in the law regulating the practice of dentistry is "worthy of good repute;" it relates to real character, not to mere reputation in that regard. (On this MARSHALL, J., dissents.) *Ibid.*

11. The power conferred upon the dental board relates to reasonable administration of matters appertaining to the public welfare, not to interferences with the internal management of dental colleges. *Ibid.*

12. The law for the regulation of the practice of dentistry does not authorize the official board to invade the private affairs of a dental college in respect to its rate of tuition or whether it

shall grant concessions from advertised rates or by taking charge, *in invitum*, of its examinations as to entrance qualifications. *Ibid.*

13. A statutory requirement as to educational qualifications for entrance upon a course of study at a dental college as a condition of the diploma eventually awarded being *prima facie* sufficient to prove qualifications for the practice of dentistry, unaccompanied by a prohibition of the common practice of allowing students to make up, in some reasonable degree, deficiencies in preliminary education during the first year after matriculation, must be presumed to contemplate such practice and the continuance thereof. *Ibid.*

14. Reputability, as the term is used in the dental law, relates to that which will enable the college to do good work and the actual accomplishment thereof; it is separate and distinct from other requisites as to a diploma being a passport to the favor of the official board as regards the issuance of a license. It may or may not exist, and all the other requisites be present. *Ibid.*

PLEADING.

Complaint. See ACTION, 2, 3. RAPE, 1. TAX TITLES, 1.

Same: Amendment.

1. In an action on the bond of a defaulting treasurer of plaintiff, the complaint, on motion, was ordered to be made more definite and certain, whereupon an amended complaint was served setting up all that was in the original one, an allegation of the misappropriation of another definite sum, and more fully and definitely asserting the inability of plaintiff to state any further details by reason of knowledge with reference thereto being in the treasurer and having been wrongfully withheld from the officers of the society, and prayed (1) a reformation of the bond; (2) discovery and accounting by the treasurer for his transactions and arrearages; (3) judgment for the amounts so ascertained in a definite sum. *Held:*

   (1) Apart from the prayer the original complaint stated a cause of action in equity.

   (2) The amendment went no further than to somewhat amplify the facts stated in the original complaint, and to pray certain steps by the court within its equity powers necessary to enable granting the same relief prayed in the former pleading. *North Side Loan & Building Society v. Nakielski,* 539

2. In view of the limitation imposed by sec. 2830, Stats. 1898, the right of the plaintiff to amend before the time for answering has expired is subject to the limitation that the inherent difference between tort and contract and between law and equity cannot be ignored. *Ibid.*

Same: Prayer: Amendment.

3. The prayer of a pleading is no part of the cause of action, and while in construing a pleading, where the facts alleged leave doubt as to the cause of action which the pleader intended to present, the prayer may be often helpful in elucidating that intent, if a cause of action is clearly set out it cannot refute it. *North Side Loan & Building Society v. Nakielski,* 539

4. Where a complaint sets forth all the facts warranting equitable relief, the prayer may, before the time for answering has ex-

pired, be amended to demand other and further relief consistent with the cause of action originally described in the allegation of facts. *Ibid.*

Answer. See CHATTEL MORTGAGES, 3, 4. SUNDAY, 3.

Same: Matter in abatement.

5. A defense of another action pending is a defense in abatement, which must be pleaded with particularity, and if not pleaded is waived. *E. M. Fish Co. v. Young,* 149

Same: Defenses.

6. Under sec. 2657, Stats. 1898, a defendant may plead as many defenses and counterclaims as he may have, even though they are based on inconsistent legal theories, and hence he may join a defense of fraud for which rescission is sought and a counterclaim for payments made, with a counterclaim for breaches of the same contract. *J. H. Clark Co. v. Rice,* 451

Counterclaim. See PLEADING, 6.

Demurrer. See CHATTEL MORTGAGES, 4.

PLEDGE. See INNKEEPERS, 3.

POLICE POWER. See CONSTITUTIONAL LAW, 6–8.

POOR. See PAUPERS.

PRACTICE. See ACTIONS, 2, 3. ALIENS, 2, 5, 6. ASSISTANCE, WRIT OF. CERTIORARI. CONTEMPT, 3–6. COSTS. CRIMINAL LAW, 1. DISCOVERY. DIVORCE. EMINENT DOMAIN, 3, 4. EXECUTORS AND ADMINISTRATORS. GARNISHMENT. JUDGMENTS. PROCESS. REFERENCE. TRIAL. WITNESSES.

PRAYER. See PLEADING, 1, 3, 4.

PREFERENCE. See ALIENS, 2–4, 7. BANKRUPTCY.

PREJUDICE. See CRIMINAL LAW, 1.

PRESUMPTIONS. See APPEAL, 16. ASSOCIATIONS, 2. PHYSICIANS AND SURGEONS, 2. PROCESS. TAX TITLES, 1.

PRINCIPAL AND AGENT. See BROKERS. CHATTEL MORTGAGES, 1, 2. GUARDIAN AND WARD, 2–4. WITNESSES, 1.

PRINCIPAL AND SURETY.

Nature and extent of liability of surety. See COSTS, 1. DAMAGES, 2. PLEADING, 1.

Same: Damages.

1. A contract contained a condition to protect plaintiff from loss by reason of strikes. There was no such condition inserted in the bond securing the performance of such contract, nor any separate bond given, and a claim was made that thereby plaintiff waived the giving of indemnity against loss by strikes. *Held,* that such claim was immaterial where the judgment in favor of plaintiff did not include any sum for damages on that ground. *Eastern R. Co. of Minn. v. Tuteur,* 382

Same: Discharge of surety. See APPEAL, 14. GUARDIAN AND WARD, 5, 9–15.

2. A contract between a railway company and P., secured by P.'s bond, provided for semi-monthly payments, the moneys earned between the 1st and the 15th of the month to be paid on or about the 20th day of the month, and those earned during the

remainder of the month to be paid on or about the 5th of the following month. Under such contract payment was made on the 15th for what had been earned during the preceding half of the month, and on the 16th for what had been earned on the 15th, such payments being made after the railway company knew that P. had violated his contract and when it was doubtful whether he could complete it. *Held,* that such payments were not such a deviation from or violation of the contract that P.'s sureties were thereby discharged. *Eastern R. Co. of Minn. v. Tuteur,* 382

3. Such provision giving the railway company five days' time in which to make payments was not a provision for the benefit of the sureties, but simply for the convenience of the railway company in auditing. *Ibid.*

4. Where money has been earned, the making of payment in advance of the day when it could be legally demanded or sued for is not, as to a surety, a prejudicial variation of the contract, but merely a waiving of a privilege. *Ibid.*

PRIORITY. See ALIENS, 2, 5.

PRIVATE LAWS. See CONSTITUTIONAL LAW, 9, 10.

PRIVILEGED COMMUNICATIONS. See EVIDENCE, 8, 9. LIBEL AND SLANDER.

PRIVILEGED OCCASION. See LIBEL AND SLANDER, 4, 6.

PROCESS.

Service: Substituted service. See ALIENS, 5, 6.

It appeared, among other things, that defendant was a foreign corporation and had fully complied with the requirements of sec. 1770*b*, Stats. 1898; that it had within this state real property which had been attached in this action, and that a cause of action existed in favor of the plaintiff and against the defendant which arose within this state. Plaintiff attempted to justify a judgment in his favor based on an order of publication of the summons and personal service outside the state. *Held:*

(1) The summons and complaint might have been served on the secretary of state as prescribed in sec. 1770*b* and subd. 13, sec. 2637, Stats. 1898.

(2) A showing that the summons and complaint had been delivered to a constable for service on the defendant, and that after diligent search he was unable to find the defendant within the state or any agent thereof on whom service could be made, does not, in such case, comply with the provisions of sec. 2640, Stats. 1898.

(3) There being no presumption of the existence of facts essential to give jurisdiction, and no valid order of publication, the court should have dismissed the action for want of jurisdiction. *Rollins v. Maxwell Bros. Co.* 142

PRODUCTION OF DOCUMENTS. See EVIDENCE, 8.

PROFITS. See INSURANCE, 4.

PROMISSORY NOTES. See BILLS AND NOTES, 2, 3. GIFTS. MORTGAGES, 2. PATENTS, 2–4. TRIAL, 12–14.

PROXIMATE CAUSE. See INSURANCE, 18–20. MASTER AND SERVANT, 11, 12. TRIAL, 15.

PUBLIC GOOD. See HIGHWAYS.
PUBLIC POLICY. See ALIENS. HIGHWAYS. SUNDAY.
PUBLIC RECORDS. See EVIDENCE, 8, 9. JUDGMENTS, 3. WILLS, 1-3.
PUNISHMENTS. See CONTEMPT, 3-6.
QUARANTINE. See PAUPERS, 1.

RAILROADS.

Right of way. See EMINENT DOMAIN.
Injuries to passengers. See STREET RAILWAYS, 1.
Injuries to employees. See STREET RAILWAYS, 2-8.
Same: Fellow-servants.

1. In an action for the negligent injury of plaintiff, a wiper in a railway company's roundhouse, required from time to time to go out on its engines to help supply them with water, under the evidence, stated in the opinion, plaintiff was a fellow-servant of the engineer within the calls of sec. 1816, Stats. 1898. *Gaffney v. Chicago, M. & St. P. R. Co.* 113
2. The protection of sec. 1816, Stats. 1898, continues until the employee is out of the danger incident to the employment. *Ibid.*
3. As long as plaintiff was upon the engine in the discharge of his duties he was "riding" and within the protection of sec. 1816, Stats. 1898, although the engine at times during the performance of such duty was stationary. *Ibid.*
4. In such case the jury found that plaintiff descended from the tender to the ground before the engine started back after he threw the spout up a second time, and was struck by the brake beam of the engine backing up as he stepped off the same. *Held*, that the fair construction of these findings is that plaintiff was struck as he stepped to the ground from the brake beam of the engine. *Ibid.*
5. MARSHALL, J. (dissenting), is of the opinion that such findings are inconsistent, and that the jury did not find with sufficient definiteness to furnish a proper basis for a judgment in favor of plaintiff. *Ibid.*

RAPE.

Indictment or information.

1. Where, in an information charging the crime of rape, the offense denounced by sec. 4381, Stats. 1898, is otherwise set forth with such degree of certainty that the court can pronounce judgment according to the right of the case, the absence of the word "feloniously," or its equivalent, if a defect, is in mere matter of form not tending to the prejudice of the defendant, does not affect his substantial rights, and the information is *held* sufficient. *Brown v. State,* 193

Nature of offense: Evidence.

2. Subject to the exception where the power of resistance is overcome by unconsciousness, threats, or exhaustion, in order to constitute the crime of rape not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means and faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated. *Brown v. State,* 193

3. In a prosecution for rape no mere general statement of the prosecutrix, involving her conclusion that she did her utmost and the like, will suffice to establish such requisite fact of resistance, but she must relate the very acts done, in order that the jury and the court may judge whether any were omitted. *Ibid.*

4. While the crime of rape can be established by the uncorroborated testimony of the sufferer, without such corroboration her testimony must be most clear and convincing. *Ibid.*

5. In a prosecution for the crime of rape the evidence, stated in the opinion, is *held* to present no proof of such resistance as is essential to that crime, and that a new trial should have been granted on that ground. *Ibid.*

6. In a prosecution for the crime of rape it is proper, on the direct examination of the prosecutrix, to ask her if the act of defendant "was against her will," if thereby is intended mere inquiry into her mental state of willingness or unwillingness. *Ibid.*

7. In a prosecution for the crime of rape a physician, called by the defendant, was asked whether at the time of a physical examination of the prosecutrix she stated to the witness that she had made no resistance or fight, and it was *held* proper to refuse to permit the question to be answered:

(1) For the reason that the witness had already been allowed to answer the same question.

(2) The prosecutrix was not a party so as to render her admissions competent evidence.

(3) The only way in which such a statement could be made admissible would be either, first, by laying a foundation for its reception as impeaching evidence; or secondly, by the state first giving evidence of parts of the same transaction whereby the defendant might be entitled to prove the remainder.

(4) Such statements, while *res gestæ* to the physical examination, were not admissible as *res gestæ* of the offense itself. *Ibid.*

RATIFICATION. See SUNDAY, 2.

REAL-ESTATE AGENT. See BROKERS.

RE-ASSESSMENT. See APPEAL, 1–3.

RECEIVERS. See CHATTEL MORTGAGES, 6.

RECORDING ACTS.

Sec. 2241, Stats. 1898, declaring void any unrecorded conveyance as against a subsequent purchaser whose conveyance shall first be duly recorded, does not exclude all other adverse effect than that which it denounces against one who neglects to place his conveyance on record. *Marling v. Nommensen,* 363

RECORDS. See ESTOPPEL, 2–5. EVIDENCE, 8, 9. JUDGMENTS, 3. WILLS, 1–3.

REDIRECT EXAMINATION. See WITNESSES, 7, 8.

REFERENCE.

See APPEAL, 13. DAMAGES, 2. JUDGMENTS, 2.

Where a cause was referred to a referee to hear, try, and determine the issues raised by the pleadings, the referee cannot re-

view an order made by the circuit court refusing to dismiss the complaint because of the refusal of plaintiff's attorney to testify as an adverse witness. *Eastern R. Co. of Minn. v. Tuteur,* 382

RELIGIOUS SOCIETIES.

Incorporation: Notice: "Stated meeting."

1. Under sec. 1990, Stats. 1898, a meeting held on the usual day of worship, at the regular home of the society, whether attended by a majority or minority of the members, is a "stated meeting" in the statutory sense. *Spiritual and Philosophical Temple v. Vincent,* 93

2. In such case the regular meeting of the association, according to the custom before and after a factional disturbance, is not rendered irregular by the mere circumstance that a part of the members, large or small, saw fit to assemble at some other place. As between the two, the latter was the irregular and the former the regular meeting. *Ibid.*

REMEDIES. See ACTION. ALIENS. APPEAL. ASSISTANCE, WRIT OF. ASSOCIATIONS, 1–3, 6, 7. BROKERS. CERTIORARI. CHATTEL MORTGAGES, 3–9. CONTEMPT. CONTRACTS, 2–4. CORPORATIONS, 2, 5–7. COUNTIES, 1, 2. COURTS, 1–3, 5. CRIMINAL LAW, 1. DISCOVERY. EMINENT DOMAIN, 2–4. FRAUD, 1. GARNISHMENT. GUARDIAN AND WARD, 5, 9–15. INNKEEPERS. INSURANCE, 9. JUDGMENTS. LANDLORD AND TENANT, 1–4. LIBEL AND SLANDER, 1. LIMITATION OF ACTIONS. MECHANICS' LIENS. NEW TRIAL. PROCESS. SUNDAY. TAX TITLES, 2. TRIAL. WILLS, 1–3.

RENT. See LANDLORD AND TENANT, 1–4.

RE-ORGANIZATION. See INSURANCE, 10.

REPAIRS. See MASTER AND SERVANT, 6, 14.

REPEAL. See STATUTES, 2.

REPRESENTATIONS. See BROKERS, 3. FRAUD. PATENTS, 2–4. TRIAL, 14. VENDOR AND PURCHASER.

REPUTABILITY. See PHYSICIANS AND SURGEONS, 1, 4, 10, 14.

REQUESTS FOR INSTRUCTIONS. See COMPROMISE AND SETTLEMENT, 3. MASTER AND SERVANT, 3. STREET RAILWAYS, 6. TRIAL, 14.

RES ADJUDICATA. See ALIENS, 5, 6. COURTS, 5. JUDGMENTS, 1.

RESCISSION. See BROKERS, 4. COMPROMISE AND SETTLEMENT.

RES GESTÆ. See RAPE, 7.

RESIDENCE. See ALIENS, 1–4, 7, 8.

RULES OF COURT.
Circuit Court Rule XXX, sec. 4 (Certiorari), 492.

SALES.

Requisites of contract: Evidence.

1. A memorandum signed by the seller and accepted by the buyer, stated in the opinion, has all the essentials of a contract, and, in the absence of any claim of fraud or ambiguity, evidence of the circumstances under which the contract was made is not admissible to aid the court in construing it. *Midland L. Co. v. Remington D. Co.* 242

2. In an action on such contract it is error to allow evidence as to what occurred between the seller's agent and the buyer prior to and contemporaneous with the making of the contract. *Ibid.*

Warranties.

3. Where one contracts for a known specified and described article—as a Northwestern cream separator—which is a known article of manufacture in the trade, and receives that article, there is no implied warranty of fitness for any purpose, and, if the purchaser obtains no express warranty, he assumes the risk of fitness. *La Crosse Plow Co. v. Helgeson,* 622

4. Where an express warranty of workmanship and material is given, it excludes an implied warranty of fitness, and hence testimony offered tending to show unfitness is properly rejected. *Ibid.*

SATISFACTION OF MORTGAGES. See ESTOPPEL, 3, 5. MORTGAGES, 2.

SCHOOL FUND. See CONTEMPT, 3.

SCHOOLS. See CERTIORARI, 6. PHYSICIANS AND SURGEONS.

SEALS. See ASSISTANCE, WRIT OF, 7.

SECONDARY EVIDENCE. See EVIDENCE, 8, 9.

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SPECIAL VERDICT. See FRAUD, 1. INSURANCE, 11. MASTER AND SERVANT, 5, 10. PATENTS, 2. STREET RAILWAYS, 1. TRIAL, 12, 15–22.

STATE BOARD OF CONTROL. See CONSTITUTIONAL LAW, 4.

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STATUTES.

Validity: Constitutionality. See ALIENS. CERTIORARI, 9. CHATTEL MORTGAGES, 9. CONSTITUTIONAL LAW. CORPORATIONS, 1, 2. JUDGMENTS, 3. LIMITATION OF ACTIONS, 2. PATENTS. WILLS, 11.

1. In case of a scheme of legislation for a particular purpose, created by the enactment of a law specially referring to the subject, and to other laws required for a complete plan, if the special enactment is the inducing provision and is unconstitutional, the whole is inefficient. The matter is governed by the rule, that where a part of a law is unconstitutional and was the inducement to the rest, which by itself would not have been enacted, the whole is void. *Huber v. Martin,* 412

Construction. See ACTION, 1, 2. APPEAL, 1–4, 25, 26, 28, 29, 31. ASSISTANCE, WRIT OF, 1, 2, 7. CERTIORARI, 11. CHATTEL MORTGAGES, 1, 3–9. CONSTITUTIONAL LAW, 4, 9–11. CONTEMPT, 1–4. CORPORATIONS, 5, 7. COSTS, 3, 4. COUNTIES. COURTS, 4. CRIMINAL LAW, 1. DISCOVERY. DIVORCE, 1. EMINENT DOMAIN. EXECUTORS AND ADMINISTRATORS. GARNISHMENT. GUARDIAN AND WARD, 9–15. INNKEEPERS, 1, 3. JUDGMENTS, 1. LIMITATION OF ACTIONS, 1, 2, 7–10. MUNICIPAL CORPORATIONS, 1, 7–16. PATENTS, 1. PAUPERS, 2, 3. PLEADING, 2, 6. PROCESS. RAILROADS, 1–3. RECORDING ACTS. RELIGIOUS SOCIETIES, 1. TAX TITLES. WILLS, 1–3, 14, 15.

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Private and local. See CONSTITUTIONAL LAW, 9, 10.

Retroactive. See CHATTEL MORTGAGES, 9.

Repeal and modification. See MUNICIPAL CORPORATIONS, 10.

2. Repeals and modifications of existing laws by implication are never favored. In case of a seeming conflict between two legislative enactments, all rules for judicial construction are to be applied to the end that they may be reconciled before reaching a conclusion that the one repeals or modifies the other. *Hay v. Baraboo,* 1

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STOCKHOLDERS. See INSURANCE, 3, 6.

STREET RAILWAYS.

Right of way. See EMINENT DOMAIN.

Negligence: Injuries to passengers.

1. In an action against a street railway company to recover damages for negligence in forcibly ejecting a passenger while the car was in motion, the evidence, stated in the opinion, is *held* sufficient to show such negligence, and also to sustain an answer to a special question submitted to the jury as to the rate of speed of the car at the time the passenger was ejected. *Hirte v. Eastern Wis. R. & L. Co.* 230

Same: Injuries to employees: Electricity.

2. In an action for the negligent killing of an experienced lineman by his coming in contact with a wire heavily charged with electricity, *held:*

   (1) If the superintendent informed decedent that, in doing the work on the pole on which he was afterwards killed, he must look out for and guard against live wires, evidence that in such conversation the decedent requested the superintendent to shut off the current while he performed the duties assigned him at the pole in question, and that the superintendent informed decedent that the current would be shut off, was material on the question of decedent's contributory negligence.

   (2) Such evidence was material and competent under the rule that all parts of a conversation, if material to the issues litigated, may properly be offered by either party as a matter of right, and that each party may give his version of a conversation, and if one gives a part sufficiently complete to be material to the case the other has a right to prove the balance.

   (3) Such right could be exercised by cross-examination or by calling other witnesses.

   (4) The exclusion of such evidence was prejudicial. *Smith v. Milwaukee E. R. & L. Co.* 253

3. In such case evidence that a statement that the wires were charged was made in decedent's presence, when from other evidence it appeared doubtful whether decedent heard such statement, did not authorize the direction of a verdict. *Ibid.*

Same: Instructions to jury.

4. In an action against a street railway company to recover damages for negligence in forcibly ejecting a passenger while the car was in motion, plaintiff's counsel, in attempting to show notice to the defendant's officers shortly after the injury, asked a question: "What did you say to Mr. G. about this trouble?" and, on objection being made, the court remarked: "You are

seeking to show that you informed the company of the improper conduct of the conductor soon after the accident happened." *Held*, that the use of the word "improper," while ill advised, did not constitute prejudicial error, since it was patent from the record that the court simply meant "the conduct which you claim was improper," and therefore the jury could not have been misled. *Hirte v. Eastern Wis. R. & L. Co.* 230

5. In an action against a street railway company to recover damages for negligence in forcibly ejecting a passenger while the car was in motion, an instruction, in substance, that if the plaintiff was using profane and insulting language or was guilty of boisterous or riotous conduct on the car, or was threatening to assault the conductor, the conductor was justified in putting him off without using unnecessary force, is not rendered erroneous by adding: "Provided the car had come to a standstill, but not if it was still in motion." *Ibid.*

6. In such case requested instructions bearing on plaintiff's conduct, stated in the opinion, are *held* to be not well drawn, and, in so far as they state correct principles, to be fully and carefully covered by the general charge. *Ibid.*

Same: Damages.

7. In an action against a street railway company to recover damages for negligence in forcibly ejecting a passenger while the car was in motion, the evidence, stated in the opinion, is *held* sufficient to justify a finding by the jury that an ulcer on plaintiff's leg was caused by the fall at the time of the ejection. *Hirte v. Eastern Wis. R. & L. Co.* 230

8. In such case the verdict is *held* not to be excessive. *Ibid.*

STRIKES. See PRINCIPAL AND SURETY, 1.

SUBSEQUENT PURCHASER. See RECORDING ACTS.

SUBSTITUTED SERVICE. See ALIENS, 5, 6. PROCESS.

SUMMONS. See ALIENS, 5. PROCESS.

SUNDAY.

See DAMAGES, 2.

1. Plaintiff loaned defendant $1,000, the transaction taking place on Sunday, and consisted of delivery and receipt of a check for that amount and of an agreement expressing the conditions of the loan. Thereafter the defendant cashed the check and had the agreement acknowledged and left for record, with directions to the register to mail it to plaintiff. *Held*, that the collection of the money on the check, and the acknowledging, recording, and transmission of the agreement, were mere incidents to the transaction constituting the making of the loan, and did not relieve the transaction from the operation and condemnation of the law respecting contracts executed on Sunday. *Jacobson v. Bentzler*, 566

2. In such case the obligation for repayment arose out of what took place on Sunday, and that agreement is void and not susceptible of ratification. *Ibid.*

3. In an action to enforce such loan the fact that such invalidity was not asserted in the answer does not preclude defendant from insisting that the agreement cannot be enforced, since, on

the ground of public policy, all the parties to the agreement are deemed equally guilty and are denied the usual remedies of the law for its enforcement. *Ibid.*

SUPERINTENDING CONTROL. See CERTIORARI, 9. COURTS, 3.

SUPPLEMENTAL PROCEEDINGS. See CONTEMPT, 5, 6.

SURETYSHIP. See PRINCIPAL AND SURETY.

SURPLUS. See INSURANCE, 7, 8.

SURVEYS. See COSTS, 3–5.

TAXATION. See APPEAL, 1–3. COUNTIES, 1, 2

TAXATION OF COSTS. See COSTS, 2, 6.

TAX TITLES

See ACTION, 2.

Evidence: Presumptions.

1. Under sec. 1176, Stats. 1898, a tax deed is admissible in evidence without proof in detail of the consecutive steps required to be taken by the taxing officers, although such consecutive steps are fully pleaded, where there is nothing in the allegations of the pleading which tends to destroy or impair the presumptive evidence of such tax deeds by virtue of such statute. *Preston v. Thayer,* 123

Limitation of actions.

2. Tax deeds on vacant and unoccupied lands were severally recorded between February 1, 1898, and May 31, 1898, and the grantee (one of the present defendants) on October 5, 1899, commenced actions thereon under sec. 1197, Stats. 1898, to bar the original owner (the present plaintiff), which actions, after answer setting up irregularities fatal to the tax deeds, were discontinued September 21, 1903. On September 23, 1903, the present action of ejectment was commenced to accomplish what was sought to be accomplished by the defense in each of the other actions. *Held,* under secs. 4249, 4250, Stats. 1898, that the three-year statute of limitation (sec. 1188, Stats. 1898) had not run against plaintiff, and therefore evidence showing the invalidity of such tax deeds was admissible. *Ibid.*

TENDER. See BROKERS, 4. COMPROMISE AND SETTLEMENT, 2.

TERMS OF COURT. See COURTS, 4, 5. CRIMINAL LAW, 1.

THREATS. See NEW TRIAL, 1, 2.

TREATIES. See ALIENS, 7.

TRESPASS. See DEEDS, 3.

TRIAL.

Course and conduct of trial. See JURY. WILLS, 7.

1. On the trial of an action for personal injuries to a servant, plaintiff is not entitled to interrogate defendant's counsel, either at the bar or on the stand as a witness, as to whether an insurance company is pecuniarily interested in the litigation. *Chybowski v. Bucyrus Co.* 332

2. No abuse of discretion in rejection of testimony can be predicated on the limiting of the respective parties to fifteen witnesses on

the question of the utility of a device covered by a patent. *J. H. Clark Co. v. Rice,* 451

Reception of evidence. See BROKERS, 8. DAMAGES, 1. DISCOVERY, 1, 3. EVIDENCE, 4–21. HOMICIDE, 1. NEW TRIAL, 7, 8. PATENTS, 3, 4. SALES, 1, 2, 4. TAX TITLES. WILLS, 10. WITNESSES.

Argument and conduct of counsel.

3. In an action for injuries to a servant received in operating a machine, the court, jury, and both parties, on plaintiff's request and defendant's assent, viewed and inspected the machine in operation at defendant's shop. No request was made by plaintiff for the production in court of the machine or any of its parts, and defendant made no offer of it or any of its parts as an exhibit during the trial. The machine was installed and in use in defendant's factory, its size and weight evidently made it difficult to transport, and detachment of its parts would prevent its use. *Held,* that it was error to rule that it was justifiable for plaintiff's counsel to argue that such nonproduction was evidence tending to refute defendant's claim that the machine was free from all discoverable defects. *Montanye v. Northern Electrical Mfg. Co.* 22

Taking case from jury: Nonsuit: Direction of verdict. See APPEAL, 11, 12, 18, 20–24. BANKRUPTCY, 3. BROKERS, 2. FIXTURES, 2. MASTER AND SERVANT, 1, 2, 9, 16. NEW TRIAL, 1, 3–5. STREET RAILWAYS, 3. WILLS, 7.

4. When the evidence in relation to a controverted question of fact on the one side accords with what must necessarily have been the case under given undisputed and indispensable circumstances, and the evidence on the other side is opposed thereto, there is no room for conflicting reasonable inferences, and hence no question for solution by a jury. *Chybowski v. Bucyrus Co.* 332

5. Whether such situation does or does not exist in any case is a matter for the court to determine, and it should do so even without a motion in that regard. Refusal so to do, in the face of a proper motion, is no less than the denial of a right. *Ibid.*

6. In an action for personal injuries alleged to have been caused by the improper working of a steam hammer, the construction of the machine is *held* to present such positive demonstration of impossibility of the accident complained of that the contrary evidence of the operatives of the machine did not raise any conflict for solution by the jury. *Ibid.*

Instructions to jury: Form, requisites, and sufficiency. See APPEAL, 6, 7, 17. BROKERS, 5. COMPROMISE AND SETTLEMENT, 3. CRIMINAL LAW, 7, 8. EVIDENCE, 2, 3. HOMICIDE, 2. INSURANCE, 11, 12. LANDLORD AND TENANT, 4. STREET RAILWAYS, 4–6. TRIAL, 16, 22.

7. Where instructions given were not erroneous, and no written requests for further instructions were made, no valid exception can be urged on the ground that abstract propositions were given on questions submitted to the jury without adequately covering the issues by the instructions applicable to the facts. *Van de Bogart v. Marinette & M. P. Co.* 104

8. A trial court is permitted to instruct the jury as to a particular matter, calling attention to part of the evidence on each side in respect thereto, not giving undue prominence to any

thereof, and coupling the same with an admonition that the particular evidence referred to, and all other evidence bearing on the question, should be considered. *Schwantes v. State,* 160

9. The practice of counsel to request and trial judges to read to juries passages from opinions of the supreme court is unwise, and usually improper if it goes beyond a mere statement of a rule of law. *Bowe v. Gage,* 245

10. In an action for personal injuries received by a sixteen-year-old boy, an instruction defining ordinary care as "such care as boys of the age, intelligence, and experience of the plaintiff usually exercise under similar circumstances" is not erroneous, although it would have been more exact had it contained words importing the idea that the care used must be the care used by the great mass of boys, or by the class of ordinarily careful boys. *Anderson v. Chicago Brass Co.* 273

11. In an action for personal injuries received by a servant from machinery, an instruction, stated in the opinion, is *held* misleading without an explanation that assumption of risk is a form of contributory negligence or want of ordinary care. *Ibid.*

12. In an action on a note given for a patent right one question submitted as part of the special verdict was whether, at the time of giving the note, the patented device had any practical utility for the purposes for which it was patented, and an instruction on that subject, that the jury must confine their "inquiry to the purposes named in the patent and those only," without stating the full purpose of the patent, is *held* misleading, although the jury were allowed to take the patent to their room and construe it for themselves. *J. H. Clark Co. v. Rice,* 451

13. In such case it was error to refuse to instruct the jury that they must answer such question "Yes," unless it was established that the device was of no practical value; that if the device was of any practical utility then they should answer the question in the affirmative. *Ibid.*

Same: Requests for instructions. See APPEAL, 17. COMPROMISE AND SETTLEMENT, 3. MASTER AND SERVANT, 3. STREET RAILWAYS, 6.

14. In an action on a note given for a patent right it was alleged that the patent was of no utility and that the plaintiff induced the defendant to give the note by false and fraudulent representations, and it was *held* error to refuse a requested instruction, stated in the opinion. *J. H. Clark Co. v. Rice,* 451

Special verdict. See FRAUD, 1. INSURANCE, 11. MASTER AND SERVANT, 5, 10. PATENTS, 2. STREET RAILWAYS, 1. TRIAL, 12.

15. A special verdict finding defendant negligent in using a set-screw on a machine at the place and manner it did, and that it thereby rendered plaintiff's working place unsafe; that plaintiff's hair caught in this set-screw while she was in the performance of her duty, and that it thereby caused her injury; and that persons of ordinary intelligence and prudence should reasonably have anticipated that the presence of the set-screw would cause some injury to employees working about the machine, sufficiently covers all the essential elements of proximate cause. *Van de Bogart v. Marinette & M. P. Co.* 104

16. General instructions given to the jury, stated in the opinion, are *held* to have transgressed the rule requiring that instructions be confined to an explanation of the questions of the special

verdict, without informing the jury of the legal effect of their answers to the questions. *Ibid.*

17. In an action for personal injuries received in operating a machine, one of the issues was whether the plaintiff did his work with ordinary care, and a question of a special verdict: "Did the plaintiff at the time of the accident feed the machine in the manner usually and customarily employed by experienced men," is *held* to relate to evidentiary matter instead of to a material issue. *Anderson v. Chicago Brass Co.* 273

18. When, in an action for personal injuries received while feeding a sheet of brass through the rollers of a machine, the plaintiff admitted that he knew of rough edges, but denied that he knew of the liability of there being slivers on the edge which might cause his hand to be drawn into the rolls, the coupling together, in a question of a special verdict, of an inquiry as to plaintiff's knowledge of liability of slivers on the sheets of brass with an inquiry as to his knowledge of the rough edges is prejudicial to plaintiff. *Ibid.*

19. In such case a special verdict finding, in answer to one question, that plaintiff knew there were liable to be slivers on the bars of brass and that he ought to have known of the danger of his glove or hand being caught on them, and, in answer to another question, that he was not guilty of any want of ordinary care which contributed to the injury, is on its face inconsistent. *Ibid.*

20. It is error to intimate or make known to a jury the effect of their answers to questions submitted in a special verdict. *Meyer v. Home Ins. Co.* 293

21. Where the jury in the special verdict have found that the defendant had actual knowledge of the defects which were claimed to have caused personal injuries to a servant, a question of said verdict: "Ought the defendant by the exercise of ordinary care to have known that the wrench was defective before plaintiff was injured," is immaterial. *Stork v. Charles Stolper Cooperage Co.* 318

22. It is contrary to the spirit of the statute governing special verdicts for the court to submit several questions together, and instruct the jury that they are so submitted because the instructions given applied equally to each, and then submit the same number of other questions, each of which was dependent upon the answer to one of such first questions. *J. H. Clark Co. v. Rice,* 451

TRUSTS AND TRUSTEES. See ACTION, 3. GUARDIAN AND WARD. GIFTS.

UNDERTAKING. See APPEAL, 29, 30. MUNICIPAL CORPORATIONS, 6.

UNDUE INFLUENCE. See WILLS, 4–6.

UNILATERAL CONTRACT. See CONTRACTS, 1.

VARIANCE. See PRINCIPAL AND SURETY, 2–4. TAX TITLES, 1.

VENDOR AND PURCHASER OF LAND.

See ESTOPPEL, 3–5. MORTGAGES, 1.

In an action to set aside a land contract for misrepresentations as to the quantity of clay loam and of cultivated land, on the evidence, stated in the opinion, the representations are *held* to be both material and adequately proved. *Post v. Roberts,* 605

VENUE. See CRIMINAL LAW, 1.

VERDICTS. See APPEAL, 11, 12, 20–24. MASTER AND SERVANT, 1, 2. NEW TRIAL, 1, 3–5. WILLS, 7.

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WAIVER. See ASSISTANCE, WRIT OF, 7. CHATTEL MORTGAGES, 4. JURY. PLEADING, 5. PRINCIPAL AND SURETY, 1, 4.

WARRANTY. See DEEDS, 3. SALES, 3, 4.

WATERWORKS. See MUNICIPAL CORPORATIONS, 2–6.

WILLS.

Probate. See APPEAL, 9. NEW TRIAL, 7, 8.

Same: Foreign wills.

1. Under the provisions of secs. 3787, 3789, 3790, Stats. 1898, governing the probate of foreign wills, and secs. 4140, 4145, Stats. 1898, and sec. 905, R. S. of U. S., governing the authentication of the records of a foreign court, the "exemplified copy" of a foreign will and of the record admitting the same to probate means a duplicate or transcript of the will and of the records or proceedings in the probate court admitting such will to probate, duly certified by the custodian as having "been by him compared with the original," and on failure to comply with such requirement the county court to which application to admit such foreign will is made does not acquire jurisdiction. *In re Box's Will,* 264

2. Under sec. 3790, Stats. 1898, it is error to refuse probate of a foreign will where there was no controversy as to the foreign probate having been made by a court of competent jurisdiction, and the exemplified copy of the proceedings in the foreign jurisdiction shows them to be regular in every respect. *In re Gertsen's Will,* 602

3. On application under sec. 3790, Stats. 1898, to probate a foreign will, the mere fact that some essentials of a valid original probate in this state are lacking will not authorize the county court to refuse it probate. *Ibid.*

Same: Evidence.

4. On proceedings for the probate of a will, the evidence as to undue influence and mental capacity, stated in the opinion, is *held* to present no such clear and overwhelming preponderance against the findings of the trial court as to justify reversal. *Mueller v. Pew,* 288

5. On proceedings for the probate of a will, declarations of the testator tending to show the exertion of undue influence over him by the principal beneficiary are inadmissible, and, even if admitted, are not evidence of the facts so narrated by him. *Ibid.*

6. In proceedings for the probate of a will, on an issue as to undue influence exerted on the testator, it is not sufficient to show that the testator's reason was convinced by persuasion or argument, if it is by his own will and intention that he carries that decision into effect. *Ibid.*

Same: Hearing or trial.

7. In proceedings for the probate of a will, no reversal of a judgment admitting the will to probate can be predicated on the refusal of the court to take the verdict of the jury that sat on the trial of the cause. *Mueller v. Pew,* 288

Construction: Conditions and restrictions.

8. Testatrix bequeathed a sum of money to her son, to be paid in fifteen yearly instalments, on condition that he attend the regular meetings of a certain church, and, by a subsequent clause, provided that, if the son did not try in good faith to carry out the condition, the sum so bequeathed should go to a charitable society. *Held,* that the will did not vest in the son absolute title to the bequest, but that it was the intention of the testatrix that the bequest should pass subject to the conditions specified. *In re Paulson's Will,* 612

9. In the construction of a will the intention of the testator as expressed therein must govern. *Ibid.*

10. In an action to construe a will, extrinsic evidence is admissible to show that a bequest to a charitable society, having no existence under the name used in the will, was in fact intended for an organization incorporated under another name. *Ibid.*

11. A provision in a will making payment of a legacy conditioned upon the beneficiary having regularly attended a named church is not contrary to public policy, nor does it infringe the provisions of art. I, sec. 18, Const. *Ibid.*

12. Testatrix bequeathed $1,500 to her son, payable in equal annual instalments for a period of fifteen years, provided he should attend regular meetings of a named church. A subsequent clause provided that, if the son did not try in good faith to carry out the condition, the "$1,500" should go to a certain charitable society, to be paid in fifteen equal annual instalments commencing five years after testatrix's death. *Held:*

(1) The bequest was not void for uncertainty or indefiniteness.

(2) The questions as to whether the son had attended "regular meetings" of the church, or if he had not attended was excusable, were properly for the determination of the court, should judicial determination be necessary.

(3) The conditions attached, at least, during the time the fifteen annual payments were to be made.

(4) The provision for the payment of the "$1,500" over to the society referred to the portion remaining unpaid at the time of the son's default. *Ibid.*

Same: Actions to construe wills: Attorney's fees.

13. In an action brought for the construction of a will the court has no authority to make an allowance out of the estate for fees of the attorney of the beneficiaries under the will in addition to taxable costs. *Kronshage v. Varrell,* 597

14. An action to construe a will is not a contest arising upon an application for the probate of a will, and the allowance authorized by ch. 397, Laws of 1901, is strictly limited to "contests arising therein, upon application for the probate of any will." *Ibid.*

15. Under ch. 397, Laws of 1901, the first court mentioned refers to the one having primary jurisdiction of the probate of wills—

the county court—as the one given authority to allow attorney's fees and direct the payment thereof out of the estate. *In re Gertsen's Will,* 602

WINDOW SCREENS. See MECHANICS' LIENS.

WITNESSES.

Production of documents. See EVIDENCE, 8.

Competency. See DISCOVERY. EVIDENCE, 8, 11, 13, 20, 21.

Same: Confidential relations: Husband and wife.

1. Where the wife of a party acts as his agent in respect to any matter material to be established in a judicial proceeding, either respecting the particular subject of inquiry or a mere evidentiary fact in respect thereto, she is a competent witness for her husband as to everything done by her within the scope of such agency. *Chickering-Chase Bros. Co. v. White,* 83

Examination of witnesses. See DISCOVERY. RAPE, 6, 7. TRIAL, 1.

Cross-examination. See STREET RAILWAYS, 2, 3.

2. A party should not be deprived of his right to cross-examination by so limiting its scope that the value and weight of the evidence given on the direct examination may not be fully tested. *Montanye v. Northern Electrical Mfg. Co.* 22
3. Cross-examination of a party for the purpose of discrediting his evidence is governed by the same rules as that of any other witness. *Schwantes v. State,* 160
4. Matters utterly irrelevant cannot be inquired into on cross-examination, even for the purposes of impeachment. *Ibid.*
5. Questions on cross-examination are not relevant for the purposes of impeachment, unless it would be competent to prove the existence of the circumstance suggested by the questions otherwise, upon a proper foundation being laid therefor, where one is required. *Ibid.*
6. Questions on cross-examination in regard to merely imaginary circumstances with no reasonable ground to expect favorable answers, or to be able to impeach the answers, are improper, and when permitted against objection to an extent liable to prejudice the jury as to the truth of the matter in hand, it is harmful error. *Ibid.*
7. It is error to exclude answers to questions put on redirect examination explaining a witness's testimony on a former trial, where the witness has been asked on cross-examination as to what was his testimony on such former trial. *Hupfer v. National Distilling Co.* 306
8. Such error is cured by a subsequent offer, with the acquiescence of the court, to allow such testimony to be given without objection and the declination of such offer. *Ibid.*

Redirect examination. See WITNESSES, 7, 8.

Corroboration. See RAPE, 4.

Impeachment. See RAPE, 7. WITNESSES, 4–6.

WORDS AND PHRASES.

Action. See ACTION, 1.

Acts or neglect of cotenants, in lease. See LANDLORD AND TENANT, 6.

Administrative discretion. See CONSTITUTIONAL LAW, 1, 2.
Appurtenances, in statute. See MECHANICS' LIENS.
Creditor, in statute. See LIMITATION OF ACTIONS, 6.
Eviction. See LANDLORD AND TENANT, 1.
Exemplified copy, in statute. See WILLS, 1.
False swearing, in policy. See INSURANCE, 13, 14.
Fellow-servant. See MASTER AND SERVANT, 18.
Final order, in statute. See APPEAL, 4.
Fraud, in policy. See INSURANCE, 13, 14.
Incompetence. See NEGLIGENCE.
Judicial proceeding. See LIBEL AND SLANDER, 3.
Legislative discretion. See CONSTITUTIONAL LAW, 1, 2.
Necessary papers, in statute. See COSTS, 2.
On account of any trespass, in deed. See DEEDS, 3.
On any bond given by a guardian, in statute. See GUARDIAN AND WARD, 12.
Party. See CERTIORARI, 3.
Person having a claim against, in statute. See LIMITATION OF ACTIONS, 6.
Privileged occasion. See LIBEL AND SLANDER, 6.
Proper board of health, in statute. See PAUPERS, 3.
Proximately, in policy. See INSURANCE, 18.
Reputable, in statute. See PHYSICIANS AND SURGEONS, 10.
Resulting from any poison or infection, in policy. See INSURANCE, 20.
Resulting from bodily infirmity or disease, the result of accident, in policy. See INSURANCE, 21.
Riding, in statute. See RAILROADS, 3.
Saloon barkeeper, in policy. See INSURANCE, 16.
State officer, in statute. See OFFICERS.
Stated meeting, in statute. See RELIGIOUS SOCIETIES.
Special proceeding. See APPEAL, 4.
Transacting business, in statute. See CORPORATIONS, 5.
Under any legal disability to sue, in statute. See GUARDIAN AND WARD, 14.
Vice-principal. See MASTER AND SERVANT, 20.

WRITS.
Of assistance. See ASSISTANCE, WRIT OF.
Of *certiorari*. See CERTIORARI.

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